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**THESIS**

**GOING BEYOND THE WATER'S EDGE: IMPROVING  
CONGRESSIONAL OVERSIGHT FOR THE  
DEPARTMENT OF HOMELAND SECURITY**

by

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March 2013

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OVERSIGHT FOR THE DEPARTMENT OF HOMELAND SECURITY**

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## **ABSTRACT**

This thesis seeks to answer the question: How can Congress improve its oversight of the Department of Homeland Security (DHS)? It is widely accepted that congressional oversight of DHS is, at best, not optimal. Currently, 108 committees and subcommittees have jurisdiction over DHS. To provide some perspective, the Department of Defense (DoD) falls under only 36, with more than 10 times the budget. The jurisdictional disparity between the committees and subcommittees is preventing Congress from providing efficient and effective oversight, which is negatively affecting DHS's ability to perform its function as the lead federal agency in homeland security. The desired end-state for this research project is to determine why Congress has failed to engage in reforms and determine what changes, if any, are feasible in improving congressional oversight of DHS.

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

CBO	Congressional Budget Office
CBP	Customs and Border Protection
CIA	Central Intelligence Agency
CIS	Citizen and Immigration Service
CRS	Congressional Research Service
CSIS	Center for Strategic and International Studies
DHS	Department of Homeland Security
DNI	Director of National Intelligence
DoD	Department of Defense
DOJ	Department of Justice
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
GAO	Government Accountability Office
HPSCI	House Permanent Select Committee on Intelligence
ICE	Immigration and Customs Enforcement
INR	Intelligence and Research
INS	Immigration Naturalization Service
JCAE	Joint Committee for Atomic Energy
NIP	National Intelligence Program
NSA	National Security Agency
SAFE	Safety and Accountability for Every
SFI	Secure Freight Initiative
SSCI	Senate Select Committee on Intelligence
TSA	Transportation Security Administration
U.S.	United States

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To my wife and daughter. You are the source of my inspiration and motivation. I love you both with all my heart. Thank you for making all things in my life wonderful.

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## I. INTRODUCTION

Of all our recommendations, strengthening congressional oversight may be among the most difficult and important.<sup>1</sup>

### A. MAJOR RESEARCH QUESTION

This thesis seeks to answer the question: How can Congress improve its oversight of the Department of Homeland Security (DHS)? It is widely accepted that congressional oversight of DHS is, at best, not optimal. Currently, 108 committees and subcommittees have jurisdiction over DHS.<sup>2</sup> To provide some perspective, the Department of Defense (DoD) falls under only 36, with more than 10 times the budget.<sup>3</sup> The jurisdictional disparity between the committees and subcommittees is preventing Congress from providing efficient and effective oversight, which is negatively affecting DHS's ability to perform its function as the lead federal agency in homeland security. The desired end-state for this research project it to determine why Congress has failed to engage in reforms and determine what changes are feasible in improving congressional oversight of DHS.

### B. IMPORTANCE

President Woodrow Wilson stated, "it is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents."<sup>4</sup> Oversight is the method through which Congress supervises delegated

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<sup>1</sup> National Commission on Terrorist Attacks Upon the United States, Philip Zelikow, Bonnie D. Jenkins, and Ernest R. May, *The 9/11 Commission Report* (New York: W.W. Norton & Company, 2004), 419.

<sup>2</sup> Associated Press, "Department of Homeland Security Overwhelmed by Congressional Oversight," *FOX News*, May 17, 2011, <http://www.fox news .com/politics/2011/05/17/homeland-security-department-overwhelmed-congressional-oversight/>.

<sup>3</sup> Paul Rosenzweig, Jena B. Baker, and James J. Carafano, "Stopping the Chaos: A Proposal for Reorganization of Congressional Oversight of the Department of Homeland Security," *Heritage Foundation WebMemo*, no. 3046, November 4, 2010, 1.

<sup>4</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, by Frederick M. Kaiser, Walter J. Olezek, and Todd B. Tatelman, CRS Report RL30240 (Washington, DC: Office of Congressional Information and Publishing, June 10, 2011), 4.

authority to entities within the executive branch of government. Oversight serves multiple purposes: ensure executive compliance with Congress' intent, improve the efficiency and effectiveness of government programs, prevent fraud waste and abuse, inform the public, and protect civil liberties, to name a few.<sup>5</sup> Considering that DHS directly interacts with more than 3.3 million people daily, more than any other federal agency, and that the problem of managing the delicate balance between the need for increased security while protecting civil liberties lies largely within the realm of homeland security, few other elements in government require more robust oversight than DHS.<sup>6</sup> However, the complicated committee structure through which oversight of DHS is conducted is preventing Congress from meeting its purpose. The following examples help illustrate this point.

In 2009, DHS officials responded to 11,680 letters, gave 2,058 briefings, and participated in 166 hearings to Congress.<sup>7</sup> This massive demand for information forces DHS officials to, as Secretary of DHS Janet Napolitano stated, "spend more time responding to congressional requests and requirements than executing their mandated homeland security responsibilities."<sup>8</sup> Congressional oversight, in its current form, presents at the very least an enormous distraction to DHS.

For several months before and after the "Underwear Bomber" incident on December 25, 2009, the Customs and Border Protection agency (CBP) operated without a commissioner. Jurisdiction for the former U.S. Customs Service, which was reorganized under CBP, belonged to the Senate Finance Committee, which maintained oversight of the agency after it was moved from the Department of Treasury to DHS.<sup>9</sup> Preoccupied

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<sup>5</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight*, by L. Elaine Halchin and Frederick M. Kaiser, CRS Report 97-936 (Washington, DC: Office of Congressional Information and Publishing, October 17, 2012), 1–2.

<sup>6</sup> Gary M. Shiffman and Jonathan Hoffman, "The Department of Homeland Security: Chief of Coordination," in *The National Security Enterprise: Navigating the Labyrinth*, ed. Roger Z. George and Harvey Rishikof (Washington, DC: Georgetown University Press, 2011), 212.

<sup>7</sup> Amy Zegart, "Congress: Pre-9/11 State of Mind," *Defining Ideas: Hoover Institution Journal*, July 2008, <http://www.hoover.org/publications/defining-ideas/articles/87216>.

<sup>8</sup> Associated Press, "Homeland Security Overwhelmed by Oversight."

<sup>9</sup> Shiffman and Hoffman, "The Department of Homeland Security," 209.

with the health care debate, the committee failed to hold a confirmation hearing on the President's nominee for commissioner, while it conducted confirmation hearings for Health and Human Services nominees.<sup>10</sup> Due largely to the structure of Congress' oversight of DHS, the CBP was left without its most senior leader, even after agency mistakes allowed a terrorist to board a United States (U.S.) bound airplane.

Since the establishment of DHS, Congress has failed to pass a homeland security authorization bill.<sup>11</sup> The House Homeland Security Committee has managed to draft legislation each year; however, the Senate Committee on Homeland Security and Governmental Affairs has not reciprocated the effort.<sup>12</sup> This inaction can be attributed to the Senate's failure to create an independent committee on homeland security armed with the exclusive legislative power to create an authorization bill, and whose sole focus is homeland security. The current Senate committee has to balance focus between its governmental affairs responsibility, which encompasses the entire federal government, while also battling other committees that share jurisdiction over DHS.<sup>13</sup>

These three examples highlight the relevance of the topic. Critics argue that the structure of congressional oversight is preventing DHS from continuing its evolution into the lead coordinating agency of the national enterprise to improve homeland security. Failure to reform the oversight process could, at best, prolong DHS's evolution into a unified and effective organization, or at worst, directly contribute to the failure to coordinate the prevention, response, and/or recovery during the next national level catastrophe.

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<sup>10</sup> Daniel J. Kaniewski, "Congress Should Consider Its Own Failures in Attempted Bombing," *Roll Call, Congressional Quarterly*, February 19, 2010.

<sup>11</sup> Govtrack.us, "S. 1546 (112th): Department of Homeland Security Authorization Act of 2012," (n.d.), <http://www.govtrack.us/congress/bills/112/s1546>; Govtrack.us, "H.R. 3116 (112th): Department of Homeland Security Authorization Act of 2012," (n.d.), <http://www.govtrack.us/congress/bills/112/hr3116>.

<sup>12</sup> Both the Senate and House have passed authorizations bills this year (2012), which are currently in conference. Once the differences in the bills are reconciled, they will be sent back to both chambers for final debate and voting. If the bill passes the final votes in the House and Senate, and the President signs the bill, this bill will be the first authorization bill for Homeland Security. James J. Carafano, "Homeland Security in the Next Administration," *Heritage Foundation Lectures*, no. 1085, May 16, 2008, 2.

<sup>13</sup> Thomas M. Susman, "Congressional Oversight of Homeland Security," *Administrative and Regulatory Law News* 30, no. 1 (Fall 2004): 3.

### C. PROBLEMS AND HYPOTHESES

In searching for options to improve congressional oversight from its current form and function, two major problems are raised. The first and most obvious problem is to determine why, despite the obvious failures and calls for change, Congress has failed to reform itself. The second problem, stemming from the first, is to determine what reforms, if any, can improve oversight of DHS.

The first problem raised by this research project is to determine why Congress has failed to engage in any reforms to match the dramatic reorganization occurring within the executive branch. Numerous warnings and recommendations were directed towards Congress before, during, and after the establishment of DHS. Many experts in homeland security warned of exactly the problems that have now beset Congress and DHS. They offered recommendations to guide congressional reform, and to promote robust oversight that would facilitate the establishment and evolution of DHS. Most often cited are the recommendations detailed in the 9/11 Commission report stating, “Congress should create a single, principal point of oversight and review for homeland security.”<sup>14</sup> However, with the exception of creating Appropriations Subcommittees for Homeland Security in both the House and Senate and the establishment of a permanent standing committee for Homeland Security in the House, Congress has largely ignored the recommendations.<sup>15</sup>

Congress has avoided reforms because few of the recommendations consider the institutional and political purposes that matter to legislators. The majority of the recommendations are focused exclusively on the programmatic purposes of oversight: to improve the efficiency, economy, and effectiveness of DHS in leading the national enterprise in homeland security. Institutionally, the reforms could weaken Congress’ ability to act as a check on the executive branch. Additionally, too much streamlining could result in committees and subcommittees becoming overwhelmed by the massive

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<sup>14</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 421.

<sup>15</sup> CSIS–BENS Task Force White Paper, “Untangling the Web: Congressional Oversight and the Department of Homeland Security,” *Center for Strategic and International Studies*, December 10, 2004, 2.

and increasingly complex workload that comes from contemporary issues. Politically, oversight jurisdiction in the homeland security realm and over DHS provide a resource rich environment for election-seeking activities. Reforms that strip credit claiming, position taking, and advertising opportunities away from members of Congress threaten their ability to pursue their reelection goals, the most potent incentive driving Congressional behavior.

The second problem, stemming from the first, is how to reconcile the recommended congressional changes with the factors inhibiting congressional reform. This thesis argues that any recommendation for reform will have to address institutional and political incentives also important to Congress if they are to be implemented. Research conducted for this thesis suggests that reforms that involve dramatic restructuring of committee and subcommittee jurisdiction are highly unlikely. The system that exists may represent the best possible balance between the conflicting purposes for congressional oversight; the delicate balance of power between the executive and legislative branches is protected and members of Congress are organized to conduct election-seeking activities. Congress has attempted significant reforms to the committee system during three periods in congressional history: 1940s, 1970s, and 1990s. However, due largely to the political purposes of oversight, reforms to the committee system have never been substantive or lasting. Only a limited number of options to improve congressional oversight on DHS would address the programmatic, institutional, and political preventing reform.

#### **D. LITERATURE REVIEW**

DHS was formed during an era in which Congress has been criticized for its failure to perform its oversight function. Books and articles detailing both a quantitative and qualitative decline in congressional oversight dominate the existing literature, with Thomas Mann and Norman J Ornstein among the most prolific critics. Mann and Ornstein argue that unlike the activist Congress of the 1970s, senators and representatives today are suffering from a lack of institutional identity. Members of Congress see themselves as representatives of their states and parties before they identify themselves as

members of the House or Senate.<sup>16</sup> This predominantly partisan identification places electoral and partisan incentives above all others. When and what caused the decline in institutional identity differs throughout the literature; however, Mann and Ornstein, as well as many others, point to the beginning of the Gingrich-led Congress in the early 1990s and the election of President Clinton. As a byproduct, congressional leaders began to resist reform. Efforts to reform the jurisdictional and procedural systems for oversight had been periodically proposed by congressional leadership in the 1970s and 1980s, but as institutional identities declined, almost no effort has been made to restructure the processes or structure of congressional oversight.<sup>17</sup>

Whatever else might have changed after the terror attacks of September 11, 2001, the primacy of partisanship in Congress came through almost entirely unchanged. Due to partisan politics, Congress largely deferred the construction of DHS to the executive branch.<sup>18</sup> The decline in oversight hearings and investigations, and the fractured committee organization, inhibited Congress' ability to guide, properly fund, and support the newly formed DHS, which contributed to DHS's failures to respond to Hurricane Katrina in 2005.<sup>19</sup> Other than the initial creation of appropriations subcommittees for homeland security, and the eventual establishment of a standing House Homeland Security Committee, little was done.<sup>20</sup> In the end, due to personal and electoral incentives, Congress refused to alter the existing jurisdictional boundaries, choosing instead to maintain committees and subcommittees as they were before 9/11, despite some obvious failures in oversight.<sup>21</sup>

As stated in a report from the Center for Strategic and International Studies (CSIS), the fragmented jurisdictional structure of Congress' oversight "preserves the

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<sup>16</sup> Thomas Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America And How To Get It Back on Track* (New York: Oxford University Press, 2008), 146–147.

<sup>17</sup> Mann and Ornstein, *The Broken Branch*, 150.

<sup>18</sup> Harold C. Reylea, "Organizing for Homeland Security," *Presidential Studies Quarterly* 33, no. 3 (September 2003): 622.

<sup>19</sup> Norman J. Ornstein and Thomas Mann, "When Congress Checks Out," *Foreign Affairs* 85, no. 6 (November/December 2006): 70.

<sup>20</sup> CSIS–BENS Task Force White Paper, "Untangling the Web," 2.

<sup>21</sup> Ornstein and Mann, "When Congress Checks Out," 70–72.

rivalries and cultural barriers that the creation of the Department was intended to eliminate; and it prevents DHS from acting as a single, well coordinated team.”<sup>22</sup> By maintaining the jurisdictional boundaries that existed before DHS was established, the homeland security effort in Congress has produced several negative effects on the policy regime. The jurisdictional disparity in Congress has intensified cultural differences and conflict within DHS and prevented cohesion. It has also created conflicts and jurisdictional turf battles in Congress that have impeded the production of needed legislation, such as an authorizations bill, and has resulted in poor legislation, such as the Secured Freight Initiative requiring the screening of 100 percent of shipping containers entering the United States.<sup>23</sup>

A vast amount of literature recommends an array of reforms geared toward the same purpose: increasing the efficiency and effectiveness of Congress’ oversight structure and process of DHS. One of the most often cited recommendations comes from the National Commission on Terrorist Attacks upon the United States (9/11 Commission). The 9/11 Commission recommended the consolidation of oversight for intelligence and counter terrorism into a single committee, based on the joint committee model, or the creation of a single committee in both the House and Senate armed with both appropriations and authorizations powers.<sup>24</sup> Addressing homeland security specifically, the 9/11 Commission recommended that oversight should not, at the very least, expand beyond one appropriations and one authorizations committee in each chamber.<sup>25</sup>

The Heritage Foundation published a less aggressive recommendation for reform in 2010. The report recommends an expansive overhaul of the oversight structure by

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<sup>22</sup> CSIS–BENS Task Force White Paper, “Untangling the Web,” 2.

<sup>23</sup> Under the Container Security Initiative (CSI), the predecessor to the Secured Freight Initiative (SFI), only containers determined to be high risk are scanned. The SFI was mandated by Congress before the effectiveness of CSI could be established by DHS. Many experts in homeland security argue that the SFI is unfeasible in terms of resources and costs, when compared to CSI. Carafano, “Homeland Security in the Next Administration,” 2, 4; Peter J. May, Ashley E. Jochim, and Joshua Sapotichne, “Constructing Homeland Security: An Anemic Policy Regime,” *The Policy Studies Journal* 39, no. 2 (2011): 301.

<sup>24</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 419–420.

<sup>25</sup> Ibid., 421.

building a model based on the structure of oversight for DoD, which differs from most recommendations in that it proposes the establishment of three standing committees in the House and Senate, with seven subcommittees organized along DHS's operational lines.<sup>26</sup> Although the Heritage report calls for a significant reduction in committees and subcommittees, it does not recommend cuts and process changes as deeply as all the previous recommendations arguing for single points of oversight or the joint committee model.

On the topic of reforming congressional oversight, similar studies have been conducted on reforms needed to improve oversight of the intelligence community. Although the two realms have some significant differences, they both suffer from jurisdictional disparity and weak processes. However, just as with the literature recommending reforms for DHS, the reforms recommended for the intelligence community call for the establishment of a joint committee, or more powerful committees in the House and Senate with appropriations and authorizations powers.<sup>27</sup> Reports from the Brookings Institution, CSIS, and the Congressional Research Service (CRS), as well as notable homeland security experts, such as Donald Kettl, all recommend similar reforms.<sup>28</sup>

Very little literature defends the current oversight system. In fact, many Congressmen agree with the criticisms of the oversight structure. Representative Peter King, House Homeland Security Committee chairman, called the current organization, "disgraceful."<sup>29</sup> However, some credible arguments exist for why Congress avoids reform. Representative Lamar Smith, chairman of the House Judiciary Committee, states

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<sup>26</sup> Rosenzweig, Baker, and Carafano, "Stopping the Chaos," 2–3.

<sup>27</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, by L. Elaine Halchin and Frederick M. Kaiser, CRS Report RL32525 (Washington, DC: Office of Congressional Information and Publishing, May 14, 2012,) 35–36.

<sup>28</sup> Donald F. Kettl, *System Under Stress: Homeland Security and American Politics* (Washington DC: Congressional Quarterly Press, 2007), 46–47; U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction: Considerations Related to Proposed Department of Homeland Security*, by Judy Schneider, CRS Report RL31449 (Washington, DC: Office of Congressional Information and Publishing, June 10, 2002).

<sup>29</sup> Associated Press, "Homeland Security Overwhelmed by Oversight."

that Congress seeks “purposeful redundancy.”<sup>30</sup> Congress intentionally maintains a certain degree of jurisdictional disparity. In the ever present struggle for power with the executive branch, Congress benefits from multiple oversight committees that can engage the executive branch from multiple angles.<sup>31</sup> Streamlining oversight could result in a relationship between Congress and the Executive branch better described as a partnership, than a checks and balances.

In separate articles, Christopher Davis and Frederick Kaiser highlight some of the potential dangers in creating a joint committee. The joint committee model would streamline the oversight process by placing the homeland security realm inside the purview of only one committee, with appropriations and authorizations powers. By limiting the number of committees with jurisdiction on a specific issue, and eliminating the need for the House Senate conference to reconcile differences in legislation, Congress loses an internal checks and balances. Unifying the appropriations and authorizations process into one committee in each chamber of Congress only encourages the bicameral conference to reconcile any legislation, and does little to improve the problems that come from a joint committee.<sup>32</sup>

Despite the obvious need for, at the very least, some cuts in jurisdiction, the literature highlights that the failure to reform is due mostly to a lack of political incentives; Congressmen are not able to drop their partisan and personal interests for the greater good of improving homeland security. Missing from the current debate are recommendations that account for the political incentives of Representatives and Senators. Almost every article recognizes the political realities; however, their recommendations are made purely from a homeland security perspective. Considering

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<sup>30</sup> Associated Press, “Homeland Security Overwhelmed by Oversight.”

<sup>31</sup> Gerald F. Warburg, “Congress: Checking Presidential Power,” in *The National Security Enterprise: Navigating the Labyrinth*, ed. Roger Z. George and Harvey Rishikof (Washington, DC: Georgetown University Press, 2011), 239.

<sup>32</sup> Christopher M. Davis, “9/11 Commission Recommendations: Joint Committee on Atomic Energy—A Model for Congressional Oversight?,” in *9/11 Commission Recommendations*, ed. John Iseby (New York: Nova Science Publishers, 2008), 83–87; U.S. Library of Congress, Congressional Research Service, *Congressional Oversight of Intelligence*, 9–14.

that Congress' refusal to reform has spanned two national emergencies and 10 years, proposals for reform must begin to understand the congressional perspective if feasible options can be constructed.

## **E. METHODS AND SOURCES**

The ultimate goal for this research project is to develop recommendations for improving congressional oversight of DHS. This thesis does that by performing three tasks: arguing that reform is necessary, identifying why Congress has rejected all proposed reforms, and developing options for reform that reconcile Congress' reasons for maintaining the status quo.

In arguing that reform is necessary, this thesis first examines the problems created by the current organization and processes for oversight of DHS. Recommendations for reform are analyzed from a homeland security perspective; what options would facilitate DHS's ability to perform its function. All the options for reform are assessed by the specific desired effect, such as streamlining jurisdiction, which includes a wide range of options that would have varied effects on DHS, e.g., reorganizing to single points of oversight versus the establishment of several standing committees with several subcommittees.

To determine why Congress has rejected reforms, this thesis then explores the incentives and disincentives for members of Congress. In understanding these behavioral motivators, the recommendations for reform can be reconsidered from a congressional perspective. When considering the goals of the members of Congress, very few of the options recommended will be feasible, for both institutional and political reasons. Additionally, the recommendations that are feasible to Congress may not be substantive enough, from a homeland security perspective.

## **F. THESIS OVERVIEW**

This thesis consists of six chapters. Following this introduction, the second chapter includes general knowledge of congressional oversight the audience must have to understand the problem. Chapter II includes sections on the purpose, legal foundations,

and congressional organization for oversight. The third chapter discusses the problems with oversight of DHS specifically. Arguing for the need for congressional reforms, the jurisdictional structure and its negative effects on DHS are presented. The fourth chapter examines the array of recommendations for congressional reform, to include the joint committee model, DoD model, and hybrid options. The fifth chapter details the institutional and political factors that affect the preferences of members of Congress. This chapter discusses how members of Congress benefit from the current system and what would be lost by engaging in the proposed reforms. The final chapter will examine periods of congressional reform in the past, focusing on the 1940s, 1970s, and the attempted reforms in the 1990s, and highlights that reforms to the committee system have never been substantive or lasting. Considering the programmatic success in the current system and limited options that account for the institutional and political factors that inhibit congressional reform, this thesis provides several recommendations to improve congressional oversight of DHS.

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## II. CONGRESSIONAL OVERSIGHT: BACKGROUND

Good oversight helps Congress evaluate how programs are administered and how they perform; ferret out waste and fraud; determine whether programs have outlived their usefulness; compel the administration to explain or justify its policies; and ensure that the federal government is run in a cost-effective, efficient manner.<sup>33</sup>

The U.S. Constitution frames a system of government designed to create conflict; some of the powers of the government are separated among the executive, legislative, and judicial branches, while other powers are shared or overlap. This intentional separation and overlap provide a mechanism that ensures that neither the executive nor legislative branch accrue too much power, and forces each branch to communicate, cooperate, and conflict with each other when necessary.<sup>34</sup> Initially after the Declaration of Independence and formation of an American national government, no executive branch was established and many of the executive's powers, in the British tradition, were entrusted to the Continental Congress. By the time of the Constitutional convention, many of the failures and inefficiencies of the Continental Congress highlighted the need for a strong executive branch. However, the idea of an executive branch with enormous powers frightened the founding fathers. The Declaration of Independence and Revolutionary War were largely motivated by the American perception of unjust rule at the hands of a monarch with unlimited powers. The framers of the Constitution had the difficult task of building a strong central government headed by an executive branch, but without the power to impose a tyranny. For the founding fathers, the concepts of separation of powers, and checks and balances, were the guiding principles that would allow them to accomplish their task.<sup>35</sup>

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<sup>33</sup> Lee Hamilton, "True Congressional Oversight," *Center on Congress*, (n.d.), <http://www.indiana.edu/~congress/outreach/opeds/oped11.htm>.

<sup>34</sup> James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (New York: Cambridge University Press, 2007), 36.

<sup>35</sup> James M. McCormick, *American Foreign Policy and Process* (Boston: Wadsworth Cengage Learning, 2010), 253–256.

The dramatic expansion, in size and capability, of the executive bureaucracy since the close of World War II and rise of increasingly complex issues that cross multiple policy domains, has forced Congress to defer and delegate more responsibility to the executive branch. In this contemporary era, to maintain the critical balance of power as intended by the founding fathers requires the execution of robust and persistent oversight by members of Congress.<sup>36</sup> Oversight refers to Congress's supervision of the executive branch for multiple purposes: ensure executive compliance with Congress' intent, improve the efficiency and effectiveness of government programs, prevent fraud waste and abuse, inform the public, and protect civil liberties, to name a few.<sup>37</sup> Congressional oversight can be organized into three categories: legislative, fiscal, and investigative.<sup>38</sup> Through these three types of oversight, implicitly mandated through the enumerated powers in the U.S. Constitution and protected through rulings by the Supreme Court, Congress has the ability to supervise and guide the operation of departments and agencies within the executive branch to ensure the government operates efficiently and effectively, in accordance with the intent of Congress, and transparent to the American public.

#### A. LEGAL ROOTS OF CONGRESSIONAL OVERSIGHT

Congress' power to conduct oversight is implicit, stemming from the wide range of powers explicitly granted to Congress by the U.S. Constitution and upheld in rulings from the Supreme Court.<sup>39</sup> Many of the powers detailed in Article I, Section 8, require Congress to have the ability to engage and evaluate the executive to determine how best to apply congressional power. For example, Article I, Section 8 grants Congress the power to maintain the Navy. Congress could not perform its mandated power without being able to determine what the Navy is doing, how it is performing, what it requires to perform better, or how much money is required to maintain or improve the force; the power to maintain a Navy requires Congress to have the power to oversee.

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<sup>36</sup> Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington, DC: The Brookings Institution, 1990), 21–22.

<sup>37</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight*, 1.

<sup>38</sup> Walter J. Oleszek, *Congressional Procedures and the Policy Process* (Washington, DC: Congressional Quarterly Press, 2011), 336.

<sup>39</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight*, 1.

For each type of oversight, a corresponding legal foundation provides Congress with the authority to conduct oversight on the executive branch. Congress' authority to conduct legislative oversight stems from Article 1, Section 8, of the Constitution, which grants Congress the power, “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>40</sup> Also known as the necessary and proper or elastic clause, this power grants Congress the ability to create legislation that directs the performance of the executive branch; statutorily stating what must or cannot be done.<sup>41</sup>

Congress' authority to conduct fiscal oversight stems from Article I, Section 9 of the Constitution, which states, “no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>42</sup> Also known as the power of the purse, the power over appropriations provides Congress with its most powerful check on the executive branch. Through the power of the purse, Congress can mandate what the executive can or cannot do, and adjust the scope of executive activity through funding.<sup>43</sup>

To perform legislative and fiscal oversight, Congress must conduct investigations to gather information guiding the legislative and fiscal processes. Investigations can also be conducted for no other purpose than to inform the government and the public on the efficiency and effectiveness of executive activities not captured in the legislative or fiscal processes, investigative oversight. The Constitution does not explicitly grant Congress authority to conduct investigations; however, numerous Supreme Court decisions have supported the implied need for investigative authority. In *McGrain v. Daugherty* (1927), the Supreme Court stated, “we are of [the] opinion that the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative

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<sup>40</sup> Steve Mount, “United States Constitution,” *USConstitution.net*, (n.d.), <http://www.usconstitution.net/const.html#A1Sec8>.

<sup>41</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight*, 2.

<sup>42</sup> Mount, “United States Constitution.”

<sup>43</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 4.

function.”<sup>44</sup> In *Watkins v. United States* (1957), the Supreme Court reinforced the 1927 ruling, stating that Congress’ power to conduct investigations into the departments within the executive, in the furtherance of Congressional tasks, were inherent in the legislative process.<sup>45</sup>

The era of modern congressional oversight stems from the passing of the Legislative Reorganization Act of 1946. For the first time, Congress’ oversight responsibility was codified by statute.<sup>46</sup> The act mandated Congress’ “continued watchfulness” over the executive branch of government.<sup>47</sup> Most importantly, the Legislative Reorganization Act reorganized Congress into the modern committee system capable of conducting robust and persistent oversight. The act authorized the establishment of professional staffs for all committees, eliminated many redundant committees, readjusted jurisdictions, and set rules for the establishment of subcommittees.<sup>48</sup> Based on the powers granted to Congress by the U.S. Constitution, supported by the Supreme Court, and statutorily reorganized to conduct continued watchfulness, today’s Congress has the ability to maintain oversight of the expanding executive branch.

## B. COMMITTEE SYSTEM

Congress conducts oversight primarily through the committee system. The committee system allows Congress to spread the responsibility for oversight among specialized teams that have developed expertise in specific policy realms and jurisdictions. It is in committees that legislation is initially considered, investigations conducted, hearings held, and proposals for Congressional action developed. Congressional committees are comprised of three types: standing, select, and joint.

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<sup>44</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 5.

<sup>45</sup> Ibid., 24.

<sup>46</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight*, 2.

<sup>47</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 7.

<sup>48</sup> Christopher J. Deering and Steven S. Smith, *Committees in Congress* (Washington, DC: Congressional Quarterly Press, 1997), 31.

Standing committees, the backbone of the committee system, propose legislation for consideration by the rest of the Congress. Standing committees are permanent elements that control legislative authority and are responsible for providing oversight of agencies that operate within their jurisdiction.<sup>49</sup> Most committees consider authorizations, such as the armed service committees, which authorizes all executive agencies programs and activities. Other committees conduct appropriations, which allocates funds to authorized programs and activities. The budget committees set the total national expenditure that guide authorizations and appropriations.<sup>50</sup> Government operations committees, such as the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Governmental Reform, also monitor the general operation of the government.<sup>51</sup> Standing committees are authorized to establish subcommittees with narrow focused expert staffs and delegate legislative jurisdiction to those subcommittees.<sup>52</sup> Currently, the House has 20 standing committees and the Senate 16.<sup>53</sup>

Select committees, also referred to as special committees, are established to conduct investigations on topics and issues that do not fall within the jurisdiction of one of the standing committees or require special attention. Select committees are normally temporary, primarily produce reports that inform the government and public, and do not propose legislation. In some cases, as with the select intelligence committees in the House and Senate, select committees can be permanent and command legislative jurisdiction. Currently, the House has four select committees and the Senate one.<sup>54</sup>

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<sup>49</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 14.

<sup>50</sup> U.S. Library of Congress, Congressional Research Service, *Committee Types and Roles*, by Valerie Heitshusen, CRS Report 98-241 (Washington, DC: Office of Congressional Information and Publishing, February 2011), 1–2.

<sup>51</sup> The Senate Committee on Homeland Security and Governmental Affairs splits its oversight responsibilities between the two policy realms, which creates problems discussed in detail in Chapter 3.

<sup>52</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 14.

<sup>53</sup> U.S. Library of Congress, Congressional Research Service, *Committee Types and Roles*, 1.

<sup>54</sup> U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*, 7; U.S. Library of Congress, Congressional Research Service, *Committee Types and Roles*, 1–2.

Joint committees combine members of both chambers of Congress into one committee for review and coordination on policy or to oversee basic government functions. Some are temporary, such as the Conference committees, which reconcile the differences between bills proposed in the separate chambers to create unified legislation. Others are permanent, such as the Joint Committee on Printing, which oversees the Government Printing Office.<sup>55</sup> Typically, joint committees are not granted legislative jurisdiction. One permanent joint committee was granted legislative jurisdiction, the Joint Committee on Atomic Energy. The joint committee was established in 1947 to oversee the newly established Atomic Energy Commission and was granted exclusive jurisdiction over all aspects of nuclear power. It was widely regarded as the most powerful committee in Congressional history, but problems with exclusive jurisdiction led to the reallocation of its jurisdictional powers to other committees in both chambers and its abolishment in 1977.<sup>56</sup> Currently, Congress has four joint committees.<sup>57</sup>

Subcommittees are critical elements in the conduct of oversight. As stated previously, standing committees can establish subcommittees and assign them a narrow focus within the jurisdiction of the parent standing committee to enable the standing committees to delegate oversight responsibility to more focused groups with specialized staffs. Standing committees can create an unlimited number of subcommittees in the Senate. House Rule X limits the number of subcommittees to five; however, more subcommittees are permitted under special circumstances, as is the case with House Appropriations Subcommittees. Currently, the House has 103 subcommittees and the Senate 74.<sup>58</sup>

Committee jurisdiction is established by precedent; once a committee has considered an issue or proposed legislation, precedent has been set and that policy area

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<sup>55</sup> U.S. Library of Congress, Congressional Research Service, *Committee Types and Roles*, 2.

<sup>56</sup> U.S. Library of Congress, Congressional Research Service, *9/11 Commission Recommendations: Joint Committee on Atomic Energy—A Model for Congressional Oversight?* by Christopher M. Davis, CRS Report RL32538 (Washington, DC: Office of Congressional Information and Publishing, August 20, 2004), introduction.

<sup>57</sup> U.S. Library of Congress, Congressional Research Service, *Committee Types and Roles*, 1.

<sup>58</sup> *Ibid.*, 1–2.

falls into the jurisdiction of that committee.<sup>59</sup> Codified by House Rule X and Senate Rule XXV, committee jurisdiction is most often defined by subject matter, not by executive departmental missions and functions. For this reason, many committees oversee the same departments that have broad functions and missions. For example, although House Rule X gives the House Homeland Security Committee jurisdiction over homeland security policy, it also gives jurisdiction of immigration and naturalization to the Judiciary Committee, and jurisdiction of federal management of emergencies and natural disasters to the Transportation and Infrastructure Committee.<sup>60</sup> Both immigration and emergency and disaster management are core functions of DHS. When coupled with comprehensive oversight, as it is known in the Senate, or special oversight, as it is known in the House, granted to some committees, such as the Agricultural Committee, jurisdiction for one executive department or an agency within a department can fall under the jurisdiction of multiple standing committees and their subcommittees; as is the case with DHS.<sup>61</sup>

### C. OVERSIGHT PROCESSES

Congress conducts legislative, fiscal and investigative oversight of the executive through several formal processes, with the most important being appropriations, authorizations, investigations, and confirmations. These processes provide Congress with access to executive agencies and individuals, which facilitates evaluation of performance and the production of statutory and non-statutory control to guide how executive agencies operate. Ideally, the result of each of these processes is the production of legislation or administrative change that ensures the government operates efficiently and effectively, in accordance with the intent of Congress, and transparent to the American public.

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<sup>59</sup> U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*, 2.

<sup>60</sup> United States House of Representatives Committee on Rules, “Rule X: Organization of Committees,” (n.d.), <http://www.rules.house.gov/singlepages.aspx?NewsID=131&rsbd=165>.

<sup>61</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 24–25; U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*, 1–6.

The authorizations process is the first step in budgeting executive agencies. All executive departments and agencies must seek approval for their programs and activities by authorizations committees to provide responsible committees with the opportunity to evaluate executive agencies and make changes by increasing or reducing the scope of a specific activity or program, mandating new and eliminating old programs, or merging programs conducted by multiple agencies to ensure the efficiency and effectiveness of executive operations. Through authorization legislation, authorizing committees can establish statutory controls that guide what executive agencies can do and encourages periodic reporting on their effectiveness.<sup>62</sup>

The appropriations process comprises the second, arguably, the most important step in budgeting executive agencies. Appropriators hold significant influence on the executive branch as they ultimately determine which agency initiatives receive funding. Appropriators evaluate executive agency spending and performance and determine the amount of funds to be allocated to ensure the efficiency and effectiveness of executive operations. Through appropriations legislation, appropriations committees and subcommittees can establish statutory controls that state what activities and programs are funded, establish limits on how much can be spent by the agency as a whole or for individual programs, and establishes time limits for spending.<sup>63</sup>

Authorization alone does not guarantee that a program or activity will receive funding. In fact, appropriations committees and subcommittees have the ability to fund or cut funding to programs and activities that authorizations committees have or have not authorized, which has resulted in authorizations committees losing influence over executive agencies. In a 2007 Senate Select Committee on Intelligence hearing on Congressional oversight of the intelligence community, Representative Lee Hamilton warned, “the intelligence community will not ignore you [Senate Select Committee on Intelligence], but they will work around you... they will go to the appropriations

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<sup>62</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 17–18; Oleszek, *Congressional Procedures and the Policy Process*, 343–344.

<sup>63</sup> Ibid., 18–19; Ibid., 344–345.

committee.”<sup>64</sup> As this approach has become a persistent problem, the authorizations process has dramatically declined, which has degraded a critical oversight mechanism, and placed more burden on the already overwhelmed appropriations committees and subcommittees.<sup>65</sup>

The investigative process is critical in maintaining continued watchfulness of executive agencies. To react to new or emerging issues, or identify issues not captured by other oversight processes, members of Congress can organize and conduct investigations in different forms, such as case work, hearings, program evaluations, or inquiries, on the executive branch, private individuals and organizations, or other members of Congress. Through conducting investigations, committees and subcommittees can gather information needed to guide the production of legislation, inform the public to ensure transparent government, and ensure the executive branch is operating efficiently, effectively, and within the intent of Congress. Individual members of Congress, existing committees and subcommittees, and newly formed select or joint committees, can organize investigations. Members of Congress can task support agencies, such as the Inspector General offices within the executive agencies, the Government Accountability Office (GAO), CRS, or the Congressional Budget Office (CBO), or contract external commissions, such as the Brookings Institution, or ad hoc groups, such as the 9/11 Commission, to conduct or support investigations.<sup>66</sup>

The confirmations process provides Congress with another mechanism through which to conduct oversight. Under Article II, Section 2, the Senate must confirm executive nominees for high-ranking positions within the government, which provides

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<sup>64</sup> Lee Hamilton, Statement made during Senate Select Committee on Intelligence Congressional Hearing on Oversight of Intelligence Activities, November 2007.

<sup>65</sup> Eric Rosenbach and Aki J. Peritz, “Confrontation or Collaboration? Congress and the Intelligence Community,” *Belfer Center for Science and International Affairs, The Harvard Kennedy School*, July 2009; Warburg, “Checking Presidential Power,” 240.

<sup>66</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 18–19; Oleszek, *Congressional Procedures and the Policy Process*, 344–345.

Senate committees with the opportunity, through nomination hearings, to evaluate and provide initial guidance to candidates for leadership of the executive agencies they oversee.<sup>67</sup>

In addition to the formal oversight processes, Congress also uses many informal processes through which to supervise and influence executive agencies. In maintaining working relationships with executive agencies, members of Congress and their personal and committee staffs conduct daily meetings or phone calls, send emails, hold working lunches and a plethora of other activities through which information is collected and influence over agency behavior is exercised.<sup>68</sup> Additionally, through non-statutory controls, such as statements made in committee reports, floor debates, and hearings that are not solidified into legislation, Congress maintains influence and encourages executive agencies to keep committees and subcommittees informed on their activities.<sup>69</sup> Congress has come to rely more heavily on informal oversight because of its low cost, in that it does not require much work on the part of the legislator, and high rewards, in that it has proven to be effective and a preferred technique by executive agencies.

#### D. DETERMINING GOOD OVERSIGHT

Walter Oleszek states, “To determine the quantity and quality of legislative oversight is not an easy assignment.”<sup>70</sup> For several reasons, determining whether Congressional oversight is effective qualitatively or quantitatively is difficult. First, there no universally accepted definition for oversight exists. Some definitions stress the investigative form of oversight while others state oversight refers to any congressional

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<sup>67</sup> U.S. Library of Congress, Congressional Research Service, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, by Christopher M. Davis and Jerry W. Mansfield, CRS Report RL30959 (Washington, DC: Office of Congressional Information and Publishing, November 15, 2012), 1; U.S. Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, 18–19; Oleszek, *Congressional Procedures and the Policy Process*, 344–345.

<sup>68</sup> Amy B. Zegart, *Eyes on Spies, Congress and the United States Intelligence Community* (Stanford: Hoover Institution Press, 2011), 19–20.

<sup>69</sup> Oleszek, *Congressional Procedures and the Policy Process*, 346–347.

<sup>70</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight: An Overview*, by Walter J. Oleszek, CRS Report R41079 (Washington, DC: Office of Congressional Information and Publishing, February 22, 2010), 3.

activity that impacts bureaucratic behavior.<sup>71</sup> Also, perceptions of effectiveness are driven by interest. To illustrate this point, Amy Zegart uses the example of off shore drilling regulation to highlight that environmental groups would view legislation much differently than oil companies.<sup>72</sup> Lastly, informal processes are difficult, if not impossible, to measure. Traditionally, oversight is measured quantitatively by the number of formal processes, such as hearings, and legislation. However, as stated earlier, Congress has come to rely heavily on less formal means of oversight, such as phone calls and emails, which cannot be accurately measured, yet comprise a significant percentage of congressional oversight activity.<sup>73</sup>

In her research into whether Congress' oversight on the intelligence community was effective or not, Amy Zegart notes, "effective oversight may be hard to define, but ineffectual oversight is often easy to see."<sup>74</sup> Recognizing the difficulty in measuring oversight, Thomas M. Susman offers six characteristics from which to evaluate whether congressional oversight is effective: oversight is directed at the executive branch, routinely conducted with follow through and without duplication and excessive burden on the executive branch, pursued professionally, assists executive agencies shape priorities, policies, and procedure, uncovers inefficiency and corruption, and informs congressional decisions on the production of legislation.<sup>75</sup> These characteristics provide a conceptual tool through which it is possible to evaluate the effectiveness of Congressional oversight subjectively on any given policy realm.

With the executive branch expanding, in both size and through delegated and deferred power from Congress, to meet challenges in an increasingly complex world, Congressional oversight is paramount to preserving the delicate balance of powers between the executive and legislative branches of government. The U.S. Constitution has granted a wide range of powers to Congress, implicitly mandating the responsibility to

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<sup>71</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight*, 4.

<sup>72</sup> Zegart, *Eyes on Spies*, 19–20.

<sup>73</sup> Oleszek, *Congressional Procedures and the Policy Process*, 357.

<sup>74</sup> Zegart, *Eyes on Spies*, 20.

<sup>75</sup> Susman, "Congressional Oversight of Homeland Security," 2.

maintain oversight of the executive branch, which has been supported and reinforced by the Supreme Court. Through the committee system and formal and informal oversight processes, Congress conducts its implicit mandate to ensure the government operates efficiently and effectively, in accordance with the intent of Congress, and transparent to the American public.

### **III. CONGRESSIONAL OVERSIGHT OF THE DEPARTMENT OF HOMELAND SECURITY: THE NEED FOR REFORM**

Congressional oversight is like a magnifying glass: Hold it one way and you can examine an object closely; hold it another way and you can burn that object to a crisp.<sup>76</sup>

As stated in the previous chapter, oversight is the method through which Congress supervises delegated authority to entities within the executive branch of government. Oversight serves multiple purposes: ensure executive compliance with Congress' intent, improve the efficiency and effectiveness of government programs, prevent fraud waste and abuse, inform the public, and protect civil liberties, to name a few.<sup>77</sup> Considering that DHS directly interacts with more than 3.3 million people daily, more than any other federal agency, and that the problem of managing the delicate balance between the need for increased security while protecting civil liberties lies largely within the realm of homeland security, few other elements in government require more robust oversight than DHS.<sup>78</sup> However, the complicated committee structure through which oversight of DHS is conducted is preventing Congress from meeting its purpose of improving the efficiency and effectiveness of DHS. Currently, 108 committees and subcommittees have jurisdiction over DHS.<sup>79</sup> To provide some perspective, the DoD falls under 36, while commanding more than 10 times the budget.<sup>80</sup> Additionally, the standing committees for homeland security in the House of Representatives and Senate do not have the legislative authority to reduce the negative impact produced by competing committees. Numerous examples highlight the detrimental effects of the fragmented oversight structure on DHS. Failure to reform the oversight structure could, at best, prolong DHS's evolution into a

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<sup>76</sup> David Silverberg, "Looking Ahead to the Next US Congress," *Homeland Security Today*, October 1, 2006.

<sup>77</sup> Oleszek, *Congressional Procedures and the Policy Process*, 334–335.

<sup>78</sup> Shiffman and Hoffman, "The Department of Homeland Security," 212.

<sup>79</sup> Associated Press, "Homeland Security Overwhelmed by Oversight."

<sup>80</sup> Rosenzweig, Baker, and Carafano, "Stopping the Chaos," 1.

unified and effective organization, or at worst, directly contribute to the failure to coordinate the prevention, response, and/or recovery during the next national level catastrophe.

#### A. GENESIS OF THE PROBLEM

In the aftermath of the terrorist attacks on September 11, 2001, Congress and the executive branch worked closely to develop a national enterprise to unify all branches and levels of government toward the goal of protecting the United States and its citizens from terrorism. Under the Homeland Security Act of 2002, DHS was established by combining 22 different federal agencies and departments under one cabinet to facilitate the national unity of effort.<sup>81</sup> The creation of DHS represented the largest government reorganization since the National Security Act of 1947, which created the modern DoD, Central Intelligence Agency (CIA), and the National Security Staff in response to the dramatic change in the U.S. role in international relations.<sup>82</sup> However, unlike the Congressional reforms mandated by the 1946 Legislative Reorganization Act, Congress failed to adjust itself to match the dramatic changes within the executive branch that occurred as a result of the 2002 Homeland Security Act.

During the construction of DHS, many warnings about the problems would arise from Congress' failure to match the major realignment of executive branch agencies. In a 2002 CRS Report, Judy Schneider recognized "dispersed responsibility" can be beneficial, but also warned of the potential problems by stating: when no single committee can claim exclusive legislative jurisdiction over a specific subject, it may be difficult or impossible to enact comprehensive legislation.<sup>83</sup> At about the same time, in a Brookings Institution report, experts stated, "whether congressional oversight enhances or impedes homeland security will, to an important degree, depend on how Congress carries out its responsibilities," and warned, "unless Congress revamps its current

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<sup>81</sup> Jessica Zuckerman, "Politics Over Security: Homeland Security Congressional Oversight In Dire Need of Reform," Heritage Foundation Issue Brief, no. 3722, September 10, 2012, 1.

<sup>82</sup> CSIS-BENS Task Force White Paper, "Untangling the Web," 4.

<sup>83</sup> U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*, 6.

oversight structure, many of the promised benefits of the proposed executive branch reorganization are likely to be lost.”<sup>84</sup> Senator Susan Collins (R-Maine), co-author of the Homeland Security Act and ranking member of the Senate Committee on Homeland Security and Government Affairs, argued for congressional reform during the construction of DHS, understanding that, “a proliferation of congressional subcommittees and full committees...complicates the authorizations process.”<sup>85</sup> Despite these warnings, Congress showed no willingness to make changes to the architecture of congressional oversight for the new and robust department.

## B. DYSFUNCTIONAL FRAMEWORK

Other than the initial creation of appropriations subcommittees for homeland security in both chambers of Congress, and the eventual establishment of a standing House Homeland Security Committee and Senate Committee on Homeland Security and Governmental Affairs, little was done to establish an improved oversight framework.<sup>86</sup> The current system has three major problems that prevent Congress from effectively performing its oversight function. First, too many committees and subcommittees have jurisdiction over DHS. Instead of reforming to streamline oversight jurisdictions, Congress has actually increased the number of committees and subcommittees with jurisdiction over DHS from the initial 86 that existed in 2003 to 108, where it remains today.<sup>87</sup> Second, many of the committees are not focused on homeland security. Committees, such as Finance, Commerce, and Agriculture, which share jurisdiction, are not primarily concerned with homeland security issues and lack homeland security expertise within their staffs.<sup>88</sup> The result is policy influence that does not always place a premium on homeland security. Lastly, the standing homeland security committees, the

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<sup>84</sup> Ivo H. Daalder, “Assessing the Department of Homeland Security,” *The Brookings Institution*, July 2002, 47.

<sup>85</sup> Senator Susan Collins quoted in Securing the Future: Management Lessons of 9/11, Partnership for Public Service and Booz Allen Hamilton, August 2011, 22.

<sup>86</sup> CSIS–BENS Task Force White Paper, “Untangling the Web,” 2.

<sup>87</sup> Rosenzweig, Baker, and Carafano, “Stopping the Chaos,” 1.

<sup>88</sup> Jena B. McNeill, “Congressional Oversight of Homeland Security in Dire Need of Overhaul,” *Heritage Foundation Backgrounder*, no. 2161, July 14, 2008, 5.

House of Representatives Homeland Security Committee and the Senate Committee on Homeland Security and Governmental Affairs, do not have the legislative authority to mitigate the effects of having so many competing committees not primarily focused on homeland security. They share legislative jurisdiction, which makes them just as powerful as other standing committees despite their homeland security focus and expertise. Additionally, the Senate Committee on Homeland Security and Government Affairs has to split its efforts between homeland security issues and its legacy focus on government affairs, which is a daunting task encompassing the entire federal government that diverts a great deal of resources and expertise away from the homeland security focus.<sup>89</sup>

Often viewed as an example of good oversight, DoD provides a model from which to compare DHS. Fewer committees and subcommittees compete for a piece of DoD, which is overseen by 36 congressional committees and subcommittees, which is a sharp contrast to the 108 overseeing DHS.<sup>90</sup> With the exception of the Appropriations Committees in both chambers, all other committees and subcommittees are primarily focused on national defense. Only the Armed Services and Appropriations committees and their subcommittees have jurisdictional authority over DoD.<sup>91</sup> For example, all Senate confirmations for DoD, other than the Inspector General, are considered by the Senate Armed Service Committee.<sup>92</sup> The Committees on Commerce, Science, and Transportation, Homeland Security and Governmental Affairs, Judiciary, and Finance, consider senate confirmations for DHS political appointees.<sup>93</sup>

To say Congressional oversight of DHS is ineffective and overwhelming DHS is an understatement and does not accurately describe the complexity of the problem. An article published in the Policy Studies Journal provides a better conceptual framework for

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<sup>89</sup> Susman, “Congressional Oversight of Homeland Security,” 3.

<sup>90</sup> Rosenzweig, Baker, and Carafano, “Stopping the Chaos,” 1.

<sup>91</sup> NPR Staff, “Who Oversees Homeland Security? Um, Who Doesn’t?” *NPR*, July 20, 2010, <http://www.npr.org/templates/story/story.php?storyId=128642876>.

<sup>92</sup> U.S. Library of Congress, Congressional Research Service, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, 6.

<sup>93</sup> Ibid., 13.

understanding the problem and its effect on DHS by describing the national enterprise for homeland security as an “anemic policy regime.”<sup>94</sup> “Policy regime” describes the national enterprise for homeland security, including all parts and levels of government, the private sector, down to the individual working to improve homeland security. The different agencies and functions within DHS are described as “subsystems.” When DHS was established, the different subsystems were stripped from other policy regimes, such as the Immigration Naturalization Service (INS) from the Department of Justice (DOJ), and placed into a new one: DHS. DHS represents a boundary-spanning regime, in that it encompassed many different functions from other policy regimes.<sup>95</sup>

Congress’ pre-DHS jurisdictional organization is one of the largest contributing factors preventing the establishment of a cohesive policy regime; the committees and subcommittees pull the different subsystems within DHS back towards their original policy regimes and away from homeland security.<sup>96</sup> This situation creates cross pressures that confuse DHS leadership, prevents the production of needed legislation, overwhelms agency officials, promotes inefficiency, and prevents DHS from establishing a unified effort toward its mission of defending the homeland from all hazards.

### **C. NEGATIVE IMPACT ON DHS: SOME EXAMPLES**

Today, the jurisdictional disparity between the 108 committees and subcommittees continues to prevent Congress from providing efficient and effective oversight, which is negatively affecting DHS’s ability to perform its function as the lead federal agency in homeland security. Congressional oversight, in its current form, presents an enormous distraction to DHS. In 2009, DHS officials responded to 11,680 letters, gave 2,058 briefings, and participated in 166 hearings to Congress.<sup>97</sup> This massive demand for information forces DHS officials to, as Secretary of DHS Janet Napolitano stated, “spend more time responding to congressional requests and requirements than

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<sup>94</sup> May, Jochim, and Sapotichne, “Constructing Homeland Security,” 286.

<sup>95</sup> Ibid., 288–290.

<sup>96</sup> Ibid., 301–302.

<sup>97</sup> Zegart, “Pre–9/11 State of Mind.”

executing their mandated homeland security responsibilities.”<sup>98</sup> This state of affairs has taken not only thousands of work hours away from the homeland security mission, but is estimated to have cost tens of millions of dollars.<sup>99</sup>

DHS often receives conflicting direction from different congressional committees and subcommittees, which creates confusion, and also affects morale and performance. Michael Chertoff, former Secretary of DHS, stated, “truthfully...most people miss the biggest problem, and that is that the direction you get from the committees tends to be inconsistent.”<sup>100</sup> In the wake of DHS and Federal Emergency Management Agency’s (FEMA) failure to coordinate the response to Hurricane Katrina in 2005, 13 bills were proposed by different committees that would affect FEMA’s organization and mission, with two generating significant Congressional action: H.R. 5316 and H.R. 5351.<sup>101</sup> Sponsored by the House Transportation and Infrastructure Committee, H.R. 5316 proposed moving FEMA out of DHS and making it an autonomous cabinet level agency, while the House Homeland Security Committee supported H.R. 5351, which proposed that FEMA remain within DHS and subordinate to the Secretary of DHS.<sup>102</sup> In the end, the Post-Katrina Emergency Management Reform Act of 2006, a compromise between H.R. 5316 and 5351, passed under 2007 Appropriations legislation, organized FEMA under DHS but with more autonomy, and restricted the Secretary of DHS from making dramatic changes to the agency.<sup>103</sup> Despite the compromise, the act did not end uncertainty over the future of FEMA. In 2009, the debate was reignited with the proposal of the FEMA Independence Act, which argued for FEMA to be removed from DHS and

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<sup>98</sup> Associated Press, “Department of Homeland Security Overwhelmed by Congressional Oversight.”

<sup>99</sup> Zuckerman, “Politics Over Security,” 1.

<sup>100</sup> NPR Staff, “Who Oversees Homeland Security?”

<sup>101</sup> U.S. Library of Congress, Congressional Research Service, *FEMA Reorganization Legislation in the 109th Congress*, by Keith Bea, and Henry Hogue, CRS Report RL33522 (Washington, DC: Office of Congressional Information and Publishing, July 12, 2006), 1.

<sup>102</sup> U.S. Library of Congress, Congressional Research Service, *Federal Emergency Management and Homeland Security Organization: Historical Developments and Legislative Options*, by Keith Bea, and Henry Hogue, CRS Report RL33369 (Washington, DC: Office of Congressional Information and Publishing, June 1, 2006), 26–28.

<sup>103</sup> “FEMA: In or Out?” Report from the Department of Homeland Security Office of Inspector General, OIG-09-25, February 2009, 8.

made into a cabinet level agency. Although the act was not passed, it would have constituted the 10th major reorganization within DHS, and the fourth for FEMA, since the establishment of the department.<sup>104</sup> This uncertainty and conflicting direction from Congress can certainly be considered a contributing factor to DHS's, FEMA in particular, notoriously low morale and painful evolution that continues to the present.<sup>105</sup>

The jurisdictional fragmentation of the committee system also facilitates oversight, in the negative sense, by responsible committees. For several months before and after the “Underwear Bomber” incident on December 25, 2009, the CBP operated without a commissioner.<sup>106</sup> Jurisdiction for the former U.S. Customs Service, reorganized into the CBP, belonged to the Senate Committee on Finance, which maintained oversight of the agency after the CBP was moved from the Department of Treasury to DHS.<sup>107</sup> Preoccupied with the health care debate, the Senate Committee on Finance failed to hold a confirmation hearing on the President’s nominee for commissioner while it conducted confirmation hearings for Department of Health and Human Services nominees.<sup>108</sup> Due largely to the structure of Congress’ oversight of DHS, the CBP was left without its most senior leader, even after agency mistakes allowed a terrorist to board a U.S. bound airplane.

Congress’ current oversight structure creates conflicts and jurisdictional turf battles within Congress, which prevents the production of needed legislation. Since the establishment of DHS, Congress has failed to pass a Homeland Security Authorization

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<sup>104</sup> The first three reorganizations of FEMA occurred when it was originally organized under the newly formed DHS in 2003, during the Secretary Chertoff’s Second Stage Review (2SR) in 2005 , and as part of the Post Katrina Emergency Management Reform Act in 2006. Jena Baker McNeill and Jessica Zuckerman, “Five Reasons Why FEMA Should Stay at DHS,” *Heritage Foundation WebMemo*, no. 2736, December 15, 2009, 1–2.

<sup>105</sup> Recently, DHS has been rated 33 out of 34 governmental agencies in work place satisfaction, which has received significant congressional attention. Testifying before the House Subcommittee on Oversight, Investigations, and Management in 2012, Admiral Thad Allen, former Commandant of the Coast Guard, attributes “duplicative oversight,” among other factors, as the source of departmental discontent. Thad W. Allen, Testimony to the U.S. House of Representatives Homeland Security Committee, Subcommittee on Oversight, Investigations, and Management, March 22, 2012.

<sup>106</sup> Kaniewski, “Congress Should Consider Its Own Failures in Attempted Bombing.”

<sup>107</sup> Shiffman and Hoffman, “The Department of Homeland Security,” 209.

<sup>108</sup> Kaniewski, “Congress Should Consider Its Own Failures in Attempted Bombing.”

bill, a critical mechanism in providing good oversight.<sup>109</sup> The House Homeland Security Committee has managed to draft legislation each year; however, the Senate Committee on Homeland Security and Governmental Affairs has not been able to reciprocate the effort.<sup>110</sup> This inaction can be attributed to the Senate's failure to create an independent Committee on Homeland Security armed with the legislative power over the myriad of other competing committees. However, to much fanfare, both the Senate and House passed authorizations bills in 2011 (S. 1546 and H.R. 3116).<sup>111</sup> The bills were sent to conference where House and Senate differences could be reconciled to create unified legislation. Yet, due to conflicts between chambers, the bill died in conference. In testimony before the House Committee on Homeland Security, Subcommittee on Management, Investigations, and Oversight in 2008, James Carafano characterized the repeated failure to pass an authorizations bill as an, "inexcusable shortfall."<sup>112</sup> Conflicts within and between the chambers of Congress, exacerbated by the proliferation of committees and subcommittees with conflicting priorities, have prevented the passing of basic and critical legislation needed to provide guidance and oversight to DHS.

Jurisdictional authority in committees not primarily focused on homeland security has resulted in the production of poor legislation. In accordance with 9/11 Commission recommendations and increasingly concerned with the possibility that terrorists could smuggle a nuclear device into the United States through a cargo container, Congress mandated the Secure Freight Initiative (SFI) as part of the Safety and Accountability for Every (SAFE) Port Act in 2006.<sup>113</sup> SFI required the screening of 100 percent of shipping

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<sup>109</sup> Govtrack.us, "S. 1546 (112th): Department of Homeland Security Authorization Act of 2012"; Govtrack.us, "H.R. 3116 (112th): Department of Homeland Security Authorization Act of 2012; McNeill, "Congressional Oversight of Homeland Security in Dire Need of Overhaul," 6; Carafano, "Homeland Security in the Next Administration," 2.

<sup>110</sup> Chris Strohm, "Homeland Security Authorization Bill Falls by the Wayside," *Nextgov*, September 24, 2008, <http://www.nextgov.com/technology-news/2008/09/homeland-security-authorization-bill-falls-by-the-wayside/42427/>.

<sup>111</sup> Mickey McCarter, "House Committee Passes DHS Authorization Bill Despite Democratic Concerns on Budget Cuts," *HS Today*, October 14, 2011, <http://www.hstoday.us/briefings/industry-news/single-article/house-committee-passes-dhs-authorization-bill-despite-democratic-concerns-on-budget-cuts/0cf3b138ccb485cdd1d5b54a18217547.html>.

<sup>112</sup> Carafano, "Homeland Security in the Next Administration," 2.

<sup>113</sup> Jena Baker McNeill and Jessica Zuckerman, "The Cargo-Screening Clog: Why the Maritime Mandate Needs to be Re-examined," *Heritage Foundation Backgrounder*, no. 2357, January 13, 2010, 1.

containers entering the United States by 2012.<sup>114</sup> Many experts in homeland security argue that SFI is unfeasible in terms of resources and costs, when compared to the Container Security Initiative (CSI), through which only containers determined to be high risk are scanned.<sup>115</sup> Senators Joseph Lieberman and Susan Collins, ranking members of the Senate Committee on Homeland Security and Government Affairs, agree with experts and support the risk based scanning under CSI; however, Congress mandated SFI before DHS could establish the effectiveness of CSI, and is supported by other committees in the Senate with jurisdiction over DHS.<sup>116</sup> The Senate Committee on Homeland Security and Government Affairs is not strong enough to prevent the passing of “feel good” legislation that appeals to other committees with DHS jurisdiction, despite their homeland security focus and expertise.

As stated in a report from the CSIS, the fragmented jurisdictional structure of Congress’ oversight “preserves the rivalries and cultural barriers that the creation of the Department was intended to eliminate; and it prevents DHS from acting as a single, well coordinated team.”<sup>117</sup> The best example is illustrated by DHS component agencies’ regional organization. DHS consists of a myriad of regional structures: FEMA is organized in 10 regions, the Coast Guard in five, CBP in 20, and Citizen and Immigration Service (CIS) in three.<sup>118</sup> Testifying in 2012 before the Senate Committee on Homeland Security and Governmental Affairs on the challenges facing DHS, retired Admiral Thad Allen stated that the incongruent organization of DHS “has severely constrained the ability of the Department to mature as an enterprise,” and that establishing unity of effort must be a priority in order to “[remove] barriers to information sharing within the

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<sup>114</sup>“Supply Chain Security: Feasibility and Cost–Benefit Analysis Would Assist DHS and Congress in Assessing and Implementing the Requirement to Scan 100 Percent of U.S.–Bound Containers,” United States Government Accountability Office Report to Congressional Requestors, GAO–10–12, Washington, DC: GPO, 2009, executive summary.

<sup>115</sup> Carafano, “Homeland Security in the Next Administration,” 2, 4.

<sup>116</sup> McNeill and Zuckerman, “The Cargo–Screening Clog,” 3; Chris Schneidmiller, “Homeland Security to Extend Cargo Nuclear Scanning Deadline,” *Global Security Newswire*, February 9, 2012, <http://www.nti.org/gsn/article/homeland-security-extend-nuclear-scanning-deadline/>.

<sup>117</sup> CSIS–BENS Task Force White Paper, “Untangling the Web,” 2.

<sup>118</sup> “Securing the Future: Management Lessons of 9/11,” Partnership for Public Service, August 2011, 24.

department and improved operational planning and execution.”<sup>119</sup> In 2004, Thomas Ridge, wanting to streamline the department to make it easier for federal, state, local, private entities to coordinate with DHS, proposed a realignment that would foster unity of effort.<sup>120</sup> The initiative was again proposed in DHS’s 2010 Bottom Up Review, in an effort to streamline command and control of the department.<sup>121</sup> However, in both instances, the efforts by DHS leadership to unify the department’s regional organization failed. Through a recent GAO investigation on the issue of DHS realignment, very little documentation could be found showing any analysis by DHS or its component agencies on restructuring the regional layout of the department.<sup>122</sup> However, J. Duncan Campbell, Tom Ridge’s former chief of staff, states that resistance came from component agencies and Congress.<sup>123</sup> Each component agency did not want to change its organization, despite bigger picture benefits, and found congressional support in the committees that have maintained oversight through the establishment of the department. Congressional committees have provided obstacles to DHS reforms that preserve barriers that prevent unity of effort within the department.

By applying Susman’s six characteristics of effective oversight listed in the previous chapter to Congress’ oversight of DHS, it is obvious that oversight of DHS cannot be considered effective. Amy Zegart’s quote, “effective oversight may be hard to define, but ineffectual oversight is often easy to see,” most certainly applies; Congress’ oversight of DHS is clearly problematic and requires improvement.<sup>124</sup> To be sure, Congressional oversight is not the only contributing factor to DHS’s ills, nor will reform solve all of DHS’s problems. However, it is obvious that Congress’ oversight in its current form is hindering DHS’s evolution into the effective organization that can

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<sup>119</sup> Thad W. Allen, Testimony to the U.S. Senate Committee on Homeland Security and Government Affairs, July 22, 2012.

<sup>120</sup> “Securing the Future: Management Lessons of 9/11,” 24.

<sup>121</sup> U.S. Government Accountability Office, *Department of Homeland Security: Efforts to Assess Realignment of its Field Office Structure* (GAO-12-185R), Washington, DC: GPO, September 28, 2012, 11.

<sup>122</sup> U.S. Government Accountability Office, *Department of Homeland Security*, 3.

<sup>123</sup> “Securing the Future: Management Lessons of 9/11,” 24.

<sup>124</sup> Zegart, *Eyes on Spies*, 20.

coordinate across the national enterprise the prevention, response, and recovery from catastrophic man-made or natural disasters, which is in direct contradiction to the key purpose of oversight. At the core of the homeland security mission is the protection of American lives, the most important of all government functions.

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## IV. RECOMMENDATIONS FOR REFORM

Having interviewed numerous members of Congress from both parties, as well as congressional staff members, we found that dissatisfaction with congressional oversight remains widespread.<sup>125</sup>

The previous chapter outlined the problem with, and effects of Congress' current oversight structure of DHS and argued that reform is necessary. Few would defend the current oversight system. In fact, many members of Congress agree, most notably the chairman of the Senate Committee on Homeland Security and Government Affairs, Sen. Joseph Lieberman, and chairman of the House of Representatives Homeland Security Committee, Rep. Peter King, who have made repeated calls for reform.<sup>126</sup> Studies from the Brookings Institution, CSIS, Heritage Foundation, and the CRS, among many others, offer recommendations to guide congressional reform and promote robust oversight that would facilitate the evolution of DHS into an agency capable of coordinating the national enterprise in the prevention, response, and recovery from natural and man-made disasters.<sup>127</sup> The options for reform are all geared toward the same purpose: streamlining committee jurisdiction and strengthening the homeland security committees to increase the efficiency and effectiveness of Congress' oversight of DHS. The majority of the recommendations propose the remapping of committee jurisdictions, elimination of some committees and subcommittees, creation of a joint committee, or committees with increased legislative authority, such as combined authorization and appropriations powers. It is widely agreed by experts in homeland security that less aggressive reforms reducing a limited number of committees and subcommittees jurisdiction will not effectively improve the oversight problems of DHS.<sup>128</sup>

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<sup>125</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 419.

<sup>126</sup> NPR Staff, "Who Oversees Homeland Security? Um, Who Doesn't?"; Associated Press, "Homeland Security Overwhelmed by Oversight."

<sup>127</sup> CSIS-BENS Task Force White Paper, "Untangling the Web"; U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*"; Daalder, "Assessing the Department of Homeland Security."

<sup>128</sup> Rosenzweig, Baker, and Carafano, "Stopping the Chaos," 2; National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 420.

## A. JOINT COMMITTEE MODEL FOR OVERSIGHT

One of the most often cited recommendations comes from the National Commission on Terrorist Attacks upon the United States (9/11 Commission). In their report, the 9/11 Commission recommended, “Congress should create a single, principal point of oversight and review for homeland security,” based on the example of the Joint Committee for Atomic Energy.<sup>129</sup> Establishing a Joint Committee for Homeland Security would dramatically streamline oversight by placing jurisdiction of DHS into one congressional committee comprised of members from both the House and Senate. Reports from the Brookings Institution, CSIS, and the CRS, as well as notable homeland security experts, such as Donald Kettl, all recommend similar reforms.<sup>130</sup>

The Joint Committee model would improve oversight of DHS by decreasing the amount of hearings, reports, and testimonies that have become an enormous burden on DHS as only one committee would have the authority to hold hearings. It would eliminate the referral of bills to multiple committees with conflicting interests and different focuses, which has been hindering the passage of needed legislation, and resulting in poor legislation, and creating conflicting messages from Congress that confuse DHS officials.<sup>131</sup> This option also eliminates the difficult task of reconciling the differences between House and Senate legislation, which killed the last proposed authorizations legislation. Understanding homeland security as a boundary spanning regime, having one committee overseeing the department would help foster unity of effort by eliminating legacy committees not primarily focused on homeland security that pull DHS’s subordinate agencies away from department’s core mission.<sup>132</sup> Last, and most importantly, with only one committee having jurisdiction, it is much easier to pinpoint

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<sup>129</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 420–421.

<sup>130</sup> CSIS–BENS Task Force White Paper, “Untangling the Web;” U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*; Kettl, *System Under Stress*, 46–47; Daalder, “Assessing the Department of Homeland Security.”

<sup>131</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight of Intelligence*, 8.

<sup>132</sup> May, Jochim, and Sapotichne, “Constructing Homeland Security,” 381.

responsibility for the oversight of DHS without the confusion that exists today, which motivates a more serious and efficient effort from the responsible committee.

## B. DOD MODEL FOR OVERSIGHT

The Heritage Foundation published a more recent recommendation for reform in 2011.<sup>133</sup> The report recommends an expansive overhaul of the oversight framework, and building a model based on the structure of oversight for DoD. This proposal was more in line with the 9/11 Commission’s bottom line recommendation that oversight should not, at the very least, expand beyond one appropriations and one authorizations committee in each chamber; a Senate and House Homeland Security Committee with authorization authority and appropriations committees.<sup>134</sup> As stated in the previous chapter, DoD is overseen by 36 congressional committees and subcommittees.<sup>135</sup> The Senate and House Armed Services Committees and Appropriations Committees maintain legislative dominance and do not share legislative authority with other committees, which has facilitated the consistent passing of both authorizations and appropriations bills without fail.<sup>136</sup> The DoD model differs from most recommendations in that it proposes the establishment of three standing committees in the House and Senate, with seven subcommittees organized along DHS’s operational lines.<sup>137</sup> Although the Heritage Foundation report calls for a significant reduction in committees and subcommittees, it does not recommend cuts as deeply as all the previous recommendations arguing for single points of oversight with combined authorization and appropriations powers, or the creation of a Joint Committee for Homeland Security.

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<sup>133</sup> Matt A. Mayer, James Jay Carafano, and Jessica Zuckerman, “Homeland Security 4.0: Overcoming Centralization, Complacency, and Politics,” *Heritage Foundation Special Report*, no. SR-97, August 23, 2011, 25–26.

<sup>134</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 421.

<sup>135</sup> Rosenzweig, Baker, and Carafano, “Stopping the Chaos,” 1.

<sup>136</sup> Kay King, “Congress and National Security,” *Council on Foreign Relations*, Council Special Report no. 58, November 2010, 16.

<sup>137</sup> Rosenzweig, Baker, and Carafano, “Stopping the Chaos,” 2–3.

Some recommendations include variations to the DoD and the joint committee models, e.g., consolidation of jurisdiction into one committee in both the House and Senate, with both appropriations and authorizations powers.<sup>138</sup> This option represents a hybrid between the DoD and Joint Committee models in that only the homeland security committees have jurisdiction, controlling both appropriations and authorizations, while still maintaining separate oversight institutions for homeland security in both chambers of Congress. More aggressive than the DoD model, and less aggressive than the Joint Committee model, having one committee in each chamber with appropriations and authorization jurisdiction maintains many of the streamlining benefits. Another hybrid recommendation, proposed specifically for the intelligence community but applicable to DHS, recommends the establishment of a temporary Joint Committee. Jurisdiction would be maintained primarily in one committee in both the House and Senate. During critical points in the Congressional cycle, such as during the deliberation on authorizations or in times of emergency, the two committees could temporarily come together to gain the legislative streamlining effects of the joint committee model.<sup>139</sup>

### C. REFORMING CONGRESSIONAL OVERSIGHT OF THE INTELLIGENCE COMMUNITY

Similar proposals for reform have been made in reference to Congress' oversight of the intelligence community, which also suffers from a fractured oversight structure. Since the 1947 National Security Act, the national intelligence enterprise has grown into an extremely complicated phenomenon, which has made it increasingly difficult for Congress to provide solid oversight on the IC, especially after 9/11. Oversight of foreign intelligence falls predominately within the realm of the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI); however, the intelligence committees only have exclusive jurisdiction over the Director of National Intelligence (DNI), CIA, and the National Intelligence Program (NIP).<sup>140</sup> In

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<sup>138</sup> CSIS–BENS Task Force White Paper, “Untangling the Web,” 4.

<sup>139</sup> U.S. Library of Congress, Congressional Research Service, *9/11 Commission Recommendations*, 28.

<sup>140</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight of Intelligence*, 1–2.

the foreign realm, the SSCI and HPSCI share oversight responsibility with the Appropriations, Armed Services, and Foreign Affairs/Foreign Relations committees over the State and Defense Department's different intelligence services, such as the National Security Agency (NSA), and Bureau of Intelligence and Research (INR).<sup>141</sup> In the domestic realm, the Federal Bureau of Investigation (FBI) is the primary agency conducting intelligence activities, which places some oversight responsibility on the SSCI and HPSCI; however, because of the FBI's law enforcement functions and its organization under the DOJ, the judiciary committees in both chambers share jurisdiction.<sup>142</sup>

The jurisdictional structure for Congress' oversight of the intelligence community was made more complicated with the establishment of DHS. Prior to the attacks, the intelligence services of non-intelligence organization, such as Customs, Coast Guard, and Federal Aviation Administration (FAA), were overseen by the select intelligence committees. After DHS was established and the non-intelligence agencies with intelligence services were consolidated under the new department, oversight jurisdiction was shared with the House Homeland Security Committee and the Senate Committee on Homeland Security and Governmental Affairs.<sup>143</sup> Although many differences exist between the intelligence community and DHS, the complicated web of oversight responsibility has created similar problems for the intelligence community that exists for DHS. In its findings, the 9/11 Commission described Congress' oversight of the intelligence community as dysfunctional and stated that Congress' failures stem from the refusal to reform themselves.<sup>144</sup> Just as with oversight of DHS, many experts recommend the establishment of a Joint Committee for Intelligence, to streamline the oversight process and strengthen the Intelligence committees that focus primarily on intelligence.

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<sup>141</sup> Mark Lowenthal, *Intelligence: From Secrets to Policy*, 5th ed. (Los Angeles: CQ Press, 2012), 243.

<sup>142</sup> L. Britt Snider, "Congressional Oversight of Intelligence after September 11," in *Transforming US Intelligence*, ed. by Jennifer E. Sims and Burton Gerber (Washington, DC: Georgetown University Press, 2005), 250.

<sup>143</sup> Ibid., 250–251.

<sup>144</sup> U.S. Library of Congress, Congressional Research Service, *9/11 Commission Recommendations*, 420.

After reviewing the negative impact of Congress' oversight structure on DHS, it is clear that reforms that simplify and streamline the complicated web of oversight responsibility are necessary. Since the establishment of DHS, members of Congress have repeated calls for reform and a wide array of options proposed by notable experts in homeland security. Proposals for reorganizing oversight of DHS using the DoD and joint committee models, or hybrids between the two, provide feasible and effective frameworks to streamline committee jurisdiction and strengthen the homeland security committees. These options provide substantive reforms that would increase the efficiency and effectiveness of Congress' oversight of DHS and eliminate many of the problems negatively affecting the department. However, after 10 years and systematic failures within the federal government that lead to the 9/11 attacks and poor response to Hurricane Katrina, Congress has refused to engage in any substantive reforms to itself.

## V. AVOIDING REFORMS: THE CONGRESSIONAL PERSPECTIVE

One must think of Congress as a complex organization responding to its environment. The institution adapts to outside environmental forces and public expectations, and to internal workload tasks and organizational arrangements.<sup>145</sup>

Since the attacks on 9/11, Congress has become adept at mandating reforms on executive agencies, especially DHS and the intelligence community, yet, has made almost no reforms to itself.<sup>146</sup> Considering the recognized need for reform and the array of options available, why has Congress failed to make any changes to itself? Rational explanations exist that can account for Congress's failure to reform what has been characterized as an irrational oversight structure.<sup>147</sup> What has been largely ignored in the literature arguing for reform of congressional oversight of DHS is the congressional perspective. Few of the recommendations consider the institutional and political purposes for oversight that drive the decisions of members of Congress. Jena McNeill, one of the most prolific critics of the current oversight structure, states, "Congress should unshackle itself from the constraints of jurisdictional protectionism and political pandering that plague the current system."<sup>148</sup> Like most experts arguing for reform, Jena McNeill's recommendations are made from a homeland security perspective; a logical belief that nothing should get in the way of the national effort to increase homeland security. Considering that Congress' refusal to reform has spanned two national emergencies and 10 years, proposals for reform must begin by accounting for the Congressional perspective if they are to be implemented.

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<sup>145</sup> James A. Thurber and Roger H. Davidson, *Remaking Congress: Change and Stability in the 1990s* (Washington, DC: Congressional Quarterly Inc., 1995), xii.

<sup>146</sup> Zegart, "Pre-9/11 State of Mind."

<sup>147</sup> Zegart, *Eyes on Spies*, 13.

<sup>148</sup> McNeill, "Congressional Oversight of Homeland Security in Dire Need of Overhaul," 7.

## **A. PURPOSES OF CONGRESSIONAL OVERSIGHT**

As stated in Chapter II, many purposes drive Congressional oversight. Walter Oleszek organizes the multiple purposes into three categories: programmatic, institutional, and political. Programmatic purposes are those aimed at improving the efficiency and effectiveness of executive departments and agencies. Institutional purposes are aimed at ensuring that executive departments and agencies are operating within the intent of Congress and maintaining the balance of power between the separate branches of government. Political purposes are those aimed at generating positive publicity and electoral support from constituents and powerful interest groups.<sup>149</sup> To be sure, all three purposes drive congressional behavior; however, proponents for reform have only addressed the programmatic purpose, to improve the efficiency, economy, and effectiveness of DHS in leading the national enterprise in homeland security. Both the argument and recommendations for reform have been made from a homeland security perspective by focusing almost exclusively on the programmatic purposes that affect how DHS operates, and have not accounted for the institutional or political purposes that also matter to members of Congress.

## **B. INSTITUTIONAL EXPLANATION FOR REFUSING REFORM**

In her research into the jurisdictional fragmentation negatively affecting the intelligence community, Amy Zegart states, “nearly all of the proposed oversight changes required simply modifying internal congressional rules and committee jurisdictions, not passing new laws.”<sup>150</sup>

As much as reform is needed and as simple as the reforms are to initiate, Congress may not view the changes as feasible, from an institutional perspective. Both the DoD and the joint committee models encourage partnerships as opposed to checks on the executive, can be susceptible to special interest groups, create stovepipes within Congress, and eliminates Congress’ ability to conduct an internal check on its self. Also, Congress intentionally encourages the proliferation of committees and subcommittees

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<sup>149</sup> Oleszek, “Congressional Oversight,” 5–6.

<sup>150</sup> Zegart, “Pre-9/11 State of Mind.”

with dispersed jurisdictional responsibility. This situation enables Congress to breakdown the demanding workload required to conduct robust oversight among specialized staffs, prevents gaps, and ensures Congress has more than one avenue from which to approach the executive branch on any given policy. Any recommendation will have to consider the institutional purposes if they are to be considered by Congress.

As stated in the previous chapter, the Joint Committee model would streamline the oversight process by placing DHS inside the purview of only one committee, with both appropriations and authorizations powers. The DoD model, although not as dramatic as the joint committee model, strips jurisdiction of DHS from over 80 committees and subcommittees and vests legislative authority in only two committees in each chamber; the Homeland Security and Appropriations committees. All proposals for reform recommend similar changes: reduction of the number of committees with jurisdiction over DHS and improved legislative authority in homeland security specific committees and their subcommittees. Although these options present some significant benefits that would improve most of the problems with oversight on DHS, they would also create different problems that would inhibit Congress' ability to conduct good oversight.

Streamlining oversight could result in a relationship between Congress and the executive branch better described as a partnership, than the constitutionally mandated checks and balances. Both the armed services committees, in both chambers, and the Joint Committee for Atomic Energy (JCAE), have been criticized for being too supportive of the executive agencies they oversee and lax in oversight.<sup>151</sup> For example, between 2003 and 2004, the Senate Armed Service Committees held no hearings on the war in Afghanistan and only nine on Iraq, while the House Armed Service Committee held only one for Afghanistan and 18 on Iraq. These hearings comprised less than 14 percent of the Armed Service committees' hearings that year, despite the DoD's lead role in both conflicts.<sup>152</sup> Not only does vesting oversight jurisdiction in fewer committees facilitate an improper relationship with executive agencies, those committees are also

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<sup>151</sup> King, "Congress and National Security," 17–18; Davis, "9/11 Commission Recommendations," 20–22.

<sup>152</sup> Ornstein and Mann, "When Congress Checks Out," 71.

more susceptible to the influence of special interest groups. Before the demise of the JCAE in the late 1970s, the joint committee was widely criticized for its responsiveness to the nuclear lobby and described as a, “huckster for the nuclear power industry,” which was a major factor leading to its abolishment.<sup>153</sup> Additionally, too much streamlining creates stovepipes that protects group think and prevents information sharing and coordination; both critical aspects in leading the national enterprise in homeland security.<sup>154</sup>

Congress intentionally encourages the proliferation of committees and subcommittees with dispersed jurisdictional responsibility. Several benefits exist to having multiple committees and subcommittees providing oversight on DHS. Spreading jurisdiction across multiple committees encourages congressional action and prevents gaps in oversight. Referring to oversight of DHS, Representative Lamar Smith, chairman of the House Judiciary Committee, describes this as, “purposeful redundancy.”<sup>155</sup> Second, in the ever present struggle for power with the executive branch, Congress benefits from multiple oversight committees that can engage the executive branch from multiple fronts. For example, although the Senate and House Armed Service Committees did not challenge the executive on Iraq or Afghanistan in 2003, the House Committee on Government Reform, with its broad investigative jurisdiction, held numerous hearings on the wars, which provided members of Congress another platform from which to engage the executive branch.<sup>156</sup> Most importantly, the proliferation of committees and subcommittees enables Congress to divide the workload demands of oversight among specialized groups. The impact of globalization, advances in information technology, and growth of the executive bureaucracy has made the task of oversight increasingly complicated. Now more than ever, single issues, such as trade, health care, and terrorism, impact many different policy regimes. Additionally, due to the dramatic improvements in information technology, members of Congress are bombarded with more information

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<sup>153</sup> Davis, “9/11 Commission Recommendations,” 23.

<sup>154</sup> King, “Congress and National Security,” 15–16; Ornstein and Mann, “When Congress Checks Out,” 71.

<sup>155</sup> Associated Press, “Homeland Security Overwhelmed by Oversight.”

<sup>156</sup> Warburg, “Checking Presidential Power,” 239.

than can they can feasibly process. With fewer committees, the responsibility of continued watchfulness would overwhelm members of Congress and their personal and committee staffs.

### C. POLITICAL EXPLANATION FOR REFUSING REFORM

While the recommendations for reform may be infeasible for Congress institutionally, they may also work against the political goals of members of Congress, arguably the most potent motivator behind Congressional behavior. The 9/11 Commission warned that, “few things are more difficult to change in Washington than congressional committee jurisdiction and prerogatives. To a member, these assignments are almost as important as the map of his or her congressional district.”<sup>157</sup> Ironically, the 9/11 Commission goes on to recommend aggressive reforms that directly attack member’s committee jurisdictions. Amy Zegart states, “electoral incentives on the outside and the zero sum nature of committee power on the inside provide powerful reasons for Congress to continue hobbling its own oversight capabilities even in today’s post 9/11 national security environment.”<sup>158</sup> Legislators avoid most options for reform because electoral incentives drive their decisions, even those that affect homeland security; politics do not stop at the water’s edge. In addition to the institutional purposes, any recommendation for reform will also have to address political purposes for members of Congress if they are to be implemented.

In his 1974 book, *Congress: The Electoral Connection*, David Mayhew develops and empirically supports a theory that describes electoral incentives as the primary driver of congressional behavior.<sup>159</sup> This is not to say that members of Congress are simply self-interested actors. Mayhew highlights that reelection is not the only goal for members, but must be accomplished if other programmatic and institutional goals are to be achieved and maintained. Members are highly unlikely to achieve and maintain many significant

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<sup>157</sup> U.S. Library of Congress, Congressional Research Service, *9/11 Commission Recommendations*, 419.

<sup>158</sup> Zegart, *Eyes on Spies*, 13.

<sup>159</sup> David Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974), 16.

policy goals within one term. They must improve their stature within their chamber and develop internal and external support for their initiatives; members of Congress need time gained through reelection. In the electoral nature of government, constituents can punish or reward members of Congress by providing material support and, most importantly, through voting. Members of Congress must win the support and votes of their constituents if they are to remain in office and pursue all other institutional and programmatic purposes.<sup>160</sup>

The committee system provides members of Congress with the organization through which they can best achieve their reelection goals. Members, for the most part, self select the committees on which they will serve. Once elected to Congress, members seek out specific committees that have jurisdiction over programs and agencies that benefit their constituencies.<sup>161</sup> For example, the Senate Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard is comprised of senators from coastal states, such as Florida, Alaska, South Carolina, and Washington.<sup>162</sup> The same holds true for membership on the House Subcommittee on Counterterrorism and Intelligence, which is dominated by representatives from states with major metropolitan areas at higher risk of terrorist attack, such as New York, California, Georgia, and Pennsylvania.<sup>163</sup> Members of Congress actively seek out membership on committees and subcommittees that provide them with resources and publicity that can advance their reelection goals.<sup>164</sup>

In their effort to secure reelection, members of Congress conduct three types of activities: credit claiming, position taking, and advertising. Credit claiming refers to a legislator's ability to deliver benefits to his constituency through his actions.<sup>165</sup> Position

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<sup>160</sup> Mayhew, *Congress*, 14–16.

<sup>161</sup> Aberbach, *Keeping a Watchful Eye*, 176.

<sup>162</sup> Zegart, *Eyes on Spies*, 37; United States Senate Committee on Commerce, Science, and Transportation, “Members of Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard,” (n.d.), <http://commerce.senate.gov/public/index.cfm?p=CommitteeMembers>.

<sup>163</sup> United States House of Representatives Committee on Homeland Security, “Members of Subcommittee on Counterterrorism and Intelligence,” (n.d.), <http://homeland.house.gov/subcommittee-CTI>.

<sup>164</sup> Terry M. Moe, “An Assessment of the Positive Theory of Congressional Dominance,” *Legislative Studies Quarterly* 12, no. 4 (November 1987): 477–478.

<sup>165</sup> Mayhew, *Congress*, 52.

taking refers to public proclamations of judgment on any policy or issue of interest to a member's constituency.<sup>166</sup> Advertising refers to a member's ability to develop a positive image with that member's constituency.<sup>167</sup> Membership on major committees or subcommittee with delegated authority that command authorizations or appropriations powers, such as the armed services and transportation committees or one of the appropriations subcommittees, grant members of Congress with the best ability to conduct all three activities.<sup>168</sup> As stated in Chapter II, major committees control the budget, nominations for senior leadership positions, and can influence the actions of executive agencies and departments through formal and informal processes.

Many proponents of reform will point to the smaller committees and subcommittees with only investigative powers as prime targets for elimination because they do not provide much control over significant programs and resources.<sup>169</sup> However, even committees and subcommittees with only investigative jurisdiction provide members with opportunities to advance electoral goals by providing public platforms from which they can gain positive publicity through advertising and position taking. Whether a member of a large committee with budget authority or a small committee or subcommittee with only investigative authority, these committees and subcommittees provide members with the ability to pursue their reelection goals.

To be sure, jurisdiction over the homeland security realm and DHS provides outstanding opportunities to conduct election-seeking activity. The Obama administration proposed \$68.9 billion for homeland security for fiscal year 2013, which is a significant increase from the \$16.9 allocated in fiscal year 2001; 52 percent, \$35.5 billion, is to be allocated to DHS, with DoD, DHHS, and DOJ receiving lesser yet significant portions of

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<sup>166</sup> Mayhew, *Congress*, 61.

<sup>167</sup> Ibid., 49.

<sup>168</sup> E. Scott Adler, *Why Congressional Reforms Fail: Reelection and the House Committee System* (Chicago: The University of Chicago Press, 2002), 20.

<sup>169</sup> Daniel Fowler, "Homeland Security Panels Working to Streamline Department Oversight," *Congressional Quarterly Today*, February 20, 2009; Daalder, "Assessing the Department of Homeland Security," 49.

the homeland security budget.<sup>170</sup> Within DHS, CBP, Transportation Security Administration (TSA), Immigration and Customs Enforcement (ICE), and the Coast Guard, overseen by different committees and subcommittees, are designated to receive roughly 70 percent of DHS's total budget.<sup>171</sup> Committee jurisdiction over any of these organizations provides outstanding opportunities to direct projects, grants, and activities that enable members of Congress to conduct credit claiming in their states and districts. In addition to credit claiming resources, DHS provides a popular platform for members to generate positive publicity. Evidence of such is highlighted in the number of Congressional hearings and testimonies in which DHS officials are called to participate. Between 2007 and 2009, DHS officials participated in over 7,000 briefings and provided testimony in 536 hearings.<sup>172</sup> Even members of committees and subcommittees without legislative or fiscal authority that generate credit claiming opportunities can benefit from the position of taking opportunities that come from investigative jurisdiction over DHS. The potential for election-seeking activity is high in the realm of homeland security, and jurisdiction is intensely protected by members who stand to lose that opportunity.

The homeland security realm and DHS itself presents members of Congress with a resource rich environment of election-seeking activities, which explains why attempted changes to alter committee jurisdiction, even small ones, have met stiff resistance by members who stand to lose access to the tools that can help them further their electoral goals. Although many members of Congress are calling for reform of the oversight structure for DHS, it is interesting to observe from which committees and subcommittees proponents and opponents to reform come. Supporters for reform come largely from committees not threatened by the proposed changes in jurisdiction, while committee threatened with losing jurisdiction present the most resistance. Senator Joseph Lieberman, Chairman of the Senate Committee on Homeland Security and Government Affairs, and Representative Peter King , former Chairman of the House Homeland

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<sup>170</sup> Congressional Budget Office, "Proposed Homeland Security Budget for 2013," September 27, 2012, <http://www.cbo.gov/publication/43520>.

<sup>171</sup> Cindy Williams, "Paying for Homeland Security: Show Me the Money," *MIT Center for International Studies Audit of Conventional Wisdom* 07–08 (May 2007): 2.

<sup>172</sup> NPR Staff, "Who Oversees Homeland Security;" Zegart, "Pre-9/11 State of Mind."

Security Committee and current Chairman of the Subcommittee on Counterterrorism and Intelligence, strongly support the recommendations of the 9/11 Commission and Heritage Foundation detailed in the previous chapter. They stand to gain from any streamlining that increases their authority to conduct election-seeking activities.<sup>173</sup> Representative Jon Mica, member of the House Transportation and Infrastructure Committee, and Senator Patrick Leahy, member of the Senate Judiciary Committee, have staunchly opposed any changes to the jurisdictional boundaries, and proposed improved coordination among committee staffs as a better solution.<sup>174</sup> If their committees were to lose jurisdiction over homeland security, they would stand to lose a powerful source of election-seeking resources and publicity. The political motivators behind Congressional behavior are indeed powerful, and must be considered by those recommending reform.

After considering the institutional and political purposes that drive congressional oversight, the options for reform proposed in the previous chapter do not present viable options for change. The joint committee model would eliminate the jurisdiction of all other committees in both chambers of Congress, while the less aggressive DoD model strips jurisdiction of DHS from over 80 committees and subcommittees. Such dramatic reforms conflict with the institutional and political purposes of oversight that most certainly matter to members of Congress. Institutionally, the reforms could facilitate the inability of Congress to act as a check on the executive. Additionally, too much streamlining could result in committees and subcommittees becoming overwhelmed by the massive and increasingly complex workload that comes from contemporary issues. Politically, oversight jurisdiction in the homeland security realm and over DHS provide a resource rich environment for election-seeking activities. Reforms that strip credit claiming, position taking, and advertising opportunities away from members of Congress threaten their ability to pursue their reelection goals. Proponents of reform of the

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<sup>173</sup> NPR Staff, “Who Oversees Homeland Security;” Associated Press, “Homeland Security Overwhelmed by Oversight.”

<sup>174</sup> Ambreen Ali, “Oversight Confusion Hinders Security Policy; Progress Report Says Too Many Committees With Jurisdiction Lead to Conflicting Guidance,” *Congressional Quarterly Roll Call*, September 8, 2011; Associated Press, “Homeland Security Overwhelmed by Oversight.”

oversight structure for DHS must account for the congressional perspective and balance the programmatic, institutional, and political purposes of oversight to create feasible options for members of Congress.

## **VI. CONCLUSION: SUMMARY AND RECOMMENDATIONS**

The knowledgeable pushing, hauling, poking, and advocacy of Congress as it keeps a watchful eye on policy and administration can be criticized, but it is consistent with Congress's role in a system of separate institutions sharing powers. What the United States now has is far from perfect, not even pretty or neat, but it could be far worse.<sup>175</sup>

### **A. SUMMARY**

Oversight is the method through which Congress supervises delegated authority to entities within the executive branch of government to ensure the government operates efficiently and effectively, in accordance with the intent of Congress, and transparent to the American public.<sup>176</sup> The dramatic expansion, in size and capability, of the executive bureaucracy since the close of World War II and rise of increasingly complex issues that cross multiple policy domains has forced Congress to defer and delegate more responsibility to the executive branch. In this contemporary era, the execution of robust and persistent oversight by members of Congress is paramount.<sup>177</sup> Based on the powers granted to Congress by the U.S. Constitution, supported by Supreme Court rulings, and statutorily reorganized to conduct continued watchfulness, today's Congress has the authority and organization to perform its oversight function.

Under the Homeland Security Act of 2002, DHS was established by combining 22 different federal agencies and departments under one cabinet tasked with leading the national enterprise toward the goal of protecting the United States and its citizens from terrorism.<sup>178</sup> Despite multiple warnings about the problems that would arise from Congress' failure to adjust committee jurisdictions to match the major realignment of

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<sup>175</sup> Aberbach, *Keeping a Watchful Eye*, 212–213.

<sup>176</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight*, 1–2.

<sup>177</sup> Aberbach, *Keeping a Watchful Eye*, 21–22.

<sup>178</sup> Zuckerman, “Politics Over Security,” 1.

executive branch agencies, members preserved the pre-DHS boundaries. Currently, 108 congressional committees and subcommittees share jurisdiction over DHS.<sup>179</sup>

The impact of having so many committees and subcommittees with overlapping jurisdiction negatively affects DHS's ability to conduct its homeland security mission. The highly fragmented system creates cross pressures that confuses and overwhelms DHS leadership, prevents the production of needed legislation, promotes inefficiency, and prevents DHS from establishing a unified effort toward its mission of defending the homeland from all hazards. Improvement of congressional oversight of DHS is needed.

Studies from the Brookings Institution, Center for Strategic and International Studies, Heritage Foundation, and the CRS, among many others, offer recommendations to guide congressional reform and promote robust oversight that would facilitate the evolution of DHS into an agency capable of coordinating the national enterprise in homeland security.<sup>180</sup> An array of options have been proposed to improve the oversight structure through remapping of committee jurisdictions, elimination of some committees, creation of a joint committee or committees with increased legislative authority, such as combined authorization and appropriations powers. The effects of streamlining committee jurisdiction would significantly improve congressional oversight of DHS. However, 10 years and two national emergencies have passed since the establishment of DHS and Congress has not engaged in any of the proposed reforms.

Congress has not acted on the recommendations because they are institutionally and politically infeasible; excessive streamlining threatens to upset the balance of power with the executive branch and reduces opportunities for members of Congress to conduct election-seeking activities. Recommendations for reforming Congress' oversight structure have been made from a purely programmatic perspective, such as seeking jurisdictional changes that streamline congressional oversight to facilitate efficient and

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<sup>179</sup> Associated Press, "Homeland Security Overwhelmed by Oversight."

<sup>180</sup> CSIS-BENS Task Force White Paper, "Untangling the Web;" U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*"; Daalder, "Assessing the Department of Homeland Security."

effective operation of DHS in homeland security. Only a more balanced perspective will produce reforms acceptable to members of Congress.

## B. A FLAWED BUT FUNCTIONAL SYSTEM

Proposals to reform the fragmented committee system for improving the effective and efficient functioning of government conflict with the need to maintain the delicate balance of power between Congress and the executive branch and the political realities faced by members of Congress. Joel D. Aberbach highlights the conflicting interests and suggests the system for oversight, although flawed, achieves its most important purposes:

The U.S. system brings together the self-interest of congressional politicians and the performance of oversight. And if one accepts the basic assumptions of a sloppy governmental system like our own, a system designed with the prevention of tyranny as its foremost goal rather than the promotion of efficiency or centralized accountability, then one can say that it works remarkably well when it comes to oversight. There are obvious problems of coordination, inconsistent messages to the bureaucracy, and errors that go uncorrected in this system, but the benefits may well outweigh the costs.<sup>181</sup>

Fractured committee jurisdiction is a byproduct of the American system of government. With a legislature charged with ensuring effective and efficient operation of executive departments and agencies, in a system designed to balance power with the executive branch, while also having to secure reelection, the committee system as it exists may provide the best balance of all options. To be sure, despite the obvious problems caused by Congress' oversight of DHS, significant oversight success has also occurred.

The Post-Katrina Emergency Management Reform Act of 2006 provides an outstanding example of good investigative and legislative oversight. Created in the aftermath of DHS and FEMA's failures in the response to Hurricane Katrina, the act turned FEMA back into a semi-autonomous agency, which prevented DHS from diverting resources and personnel to other agencies or positions within the department.<sup>182</sup>

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<sup>181</sup> Aberbach, *Keeping a Watchful Eye*, 201.

<sup>182</sup> During the Clinton administration, FEMA was an independent cabinet level agency that responded directly to the President. During the establishment of DHS, FEMA was organized under the department. Rick Nelson, Ben Bodurain, and Andrew McEvoy, "Five Years After Katrina," *Center for Strategic & International Studies*, September 7, 2010.

Through the legislation, Congress mandated the formulation of the Quadrennial Homeland Security Review and Bottom-Up Review to facilitate better oversight of DHS. Responding to the Federal Response to Homeland Security Report, the act also eliminated the National Response Plan and replaced it with the National Response Framework, a more concise document, with clearly detailed roles and responsibilities for federal agencies, and integrated state and local elements in disaster response.<sup>183</sup> Successful improvements in disaster response at all levels of government were evident throughout 2008 in the responses to Hurricanes Ike and Gustav, floods that ravaged the Midwest, and wildfires in the West. As a more recent example, the response to Hurricane Sandy seems to continue the trend, which can be largely attributed to congressionally mandated reforms of DHS.<sup>184</sup> The system for oversight may not be the most effective and efficient, but it is not entirely dysfunctional either.

### C. THE MYTH OF CONGRESSIONAL REFORM

Many proponents for reform point to past periods in congressional history as evidence that significant reforms to the committee system are possible. A study from the Brookings Institution states:

History gives grounds for optimism that Congress can make the organizational changes needed to grapple with the challenge of overseeing homeland security. In merging the Naval and War Committees into unified Armed Services Committees after World War II and in creating the Budget and Intelligence Committees in the mid-1970s, members overcame their innate inertia and put their policy interests above their parochial concerns. The same logic would support a comparable reorganization today.<sup>185</sup>

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<sup>183</sup> U.S. Library of Congress, Congressional Research Service, *The National Response Framework: Overview and Possible Issues for Congress* by Bruce R. Lindsay, CRS Report RL34758 (Washington, DC: Office of Congressional Information and Publishing, November 20, 2008), 6–14.

<sup>184</sup> Steve Vogel, “Officials and Experts Praising FEMA for Its Response to Hurricane Sandy,” Washington Post, November 1, 2012, [http://www.washingtonpost.com/politics/decision2012/officials-and-experts-praising-fema-for-its-response-to-hurricane-sandy/2012/11/01/7a6629d8-2447-11e2-ac85-e669876c6a24\\_story.html](http://www.washingtonpost.com/politics/decision2012/officials-and-experts-praising-fema-for-its-response-to-hurricane-sandy/2012/11/01/7a6629d8-2447-11e2-ac85-e669876c6a24_story.html); Hannah Goch-Begley, “Fox Smears FEMA By Comparing Sandy Response to Katrina,” *Media Matters for America*, November 5, 2012, <http://mediamatters.org/research/2012/11/05/fox-smears-fema-by-comparing-sandy-response-to/191163>.

<sup>185</sup> Daalder, “Assessing the Department of Homeland Security,” 54.

Several attempts throughout history have been made to adjust committee jurisdiction for the purpose of improving Congress' general performance; however, no reforms have been substantive or lasting. In fact, the system that exists today is not that different from that of the post-1946 Legislative Reform Act Congress.<sup>186</sup>

Congress underwent the most significant reforms to the committee system in response to the establishment of DoD, CIA, and the National Security Staff in the 1947 National Security Act.<sup>187</sup> As the executive bureaucracy expanded to meet the increasingly complex challenges of the Cold War era, Congress was left without the capacity or capability to check executive dominance. Through the passing of the 1946 Legislative Reorganization Act, Congress reorganized into a modern committee system capable of conducting robust and persistent oversight of the executive. As stated in Chapter II, the reform act authorized the establishment of professional staffs for all committees, eliminated many redundant committees, readjusted jurisdictions, and set rules for the establishment of subcommittees.<sup>188</sup> Congress successfully cut the number of committees in both chambers by more than half the original number, from 33 to 15 in the Senate and from 48 to 19 in the House, to streamline and simplify oversight of the expanding executive branch.<sup>189</sup> However, by 1950, Congress had simply created many new subcommittees: 80 in the Senate and 100 in the House.<sup>190</sup> The number of committees and subcommittees in the immediate post reform period represented a dramatic increase in Congressional elements armed with jurisdictional authority. Referring to the impact of the 1946 Legislative Reorganization Act, Joel Aberbach states, "whatever else the reforms may have done, they did not solve either the problems of the committee system or of oversight."<sup>191</sup>

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<sup>186</sup> Adler, *Why Congressional Reforms Fail*, 213.

<sup>187</sup> CSIS-BENS Task Force White Paper, "Untangling the Web," 4.

<sup>188</sup> Deering and Smith, *Committees in Congress*, 31.

<sup>189</sup> Leroy N. Rieslbach, "Congressional Change: Historical Perspectives," in *Remaking Congress: Change and Stability in the 1990s*, ed. James A. Thurber and Roger H. Davidson (Washington, DC: Congressional Quarterly Inc., 1995), 15.

<sup>190</sup> Deering and Smith, *Committees in Congress*, 29.

<sup>191</sup> Aberbach, *Keeping a Watchful Eye*, 23.

Again concerned with executive dominance, Congress engaged in a second round of reforms to the committee system in the early 1970s. The Vietnam War, Watergate scandal, and rampant abuses of power by the intelligence community propelled Congress to engage in further reform to improve its general performance. Changes occurred incrementally with the passing of the 1970 Legislative Reform Act, 1974 Budget and Impoundment Control Act, and adoption of several reform proposals by the Hansen Commission in 1971, 1972, and 1974.<sup>192</sup> However, the threat of altering committee jurisdictions met stiff resistance, and they were not adopted in either chamber. In the end, the reforms of the 1970s resulted in no decrease in the number of committees or subcommittees and only minor changes to committee jurisdiction. More importantly though, the 1970s reforms strengthened the powers of subcommittees through the adoption of the Subcommittee Bill of Rights in 1974, which provided subcommittees with fixed jurisdiction supported by automatic referral of legislation.<sup>193</sup> By 1977, the number of subcommittees grew to 140 in the Senate and 151 in the House.<sup>194</sup>

Discussing Congress' 1970s reforms, Aberbach states that members of Congress, "were willing to build up staff resources... to assist them in their oversight and other work," but "they tended to water down or not to adopt proposals that risked their prerogatives as individuals or committee members."<sup>195</sup> By the 1980s, DoD leadership complained of being overwhelmed by Congressional hearings. In 1983 alone, DoD officials had provided 2,160 hours of testimony to 96 different committees and subcommittees. In that same year, the Navy published 37 reports for only two committees, while responding to questions and providing testimony to a number of other subcommittees.<sup>196</sup> Referring to the impact of the 1970s reform efforts, Leroy R. Rieslbach states, "Congress neither reclaimed authority from the executive nor imposed

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<sup>192</sup> Deering and Smith, *Committees in Congress*, 33–42.

<sup>193</sup> Aberbach, *Keeping a Watchful Eye*, 29.

<sup>194</sup> Rieslbach, "Congressional Change," 18.

<sup>195</sup> Aberbach, *Keeping a Watchful Eye*, 29.

<sup>196</sup> Theodore J. Crackel, "Pentagon Management Problems: Congress Shares the Blame," *Heritage Foundation Backgrounder*, no. 405, January 22, 1985, 3–4.

its programmatic judgments on the executive with any regularity or success.”<sup>197</sup> The reforms to the committee system were constrained by members’ need to protect their ability to conduct election-seeking activities, which resulted in little improvement to Congress’ system of oversight.

In the early 1990s, at the beginning of the 104th Congress, the House pledged a series of sweeping reforms, as part of the Contract with America that would dramatically alter the committee system, which included the elimination of one in every three House committees.<sup>198</sup> In the end, the House eliminated only three standing committees, 31 subcommittees, and placed limits on the number of subcommittees each standing committee could establish.<sup>199</sup> Unlike the Congress of the 1940s and 1970s, members in both chambers were suffering from a lack of institutional identity. Senators and Representatives had begun to see themselves as representatives of their states and parties before they identified themselves as members of the House or Senate.<sup>200</sup> This predominantly partisan identification placed political incentives above all others; political purposes became the most potent driver of Congressional behavior.

As institutional identities continued to decline, almost no effort has been made to change the processes or structure of Congressional oversight as evidenced by Congress’ failure to reform itself today.<sup>201</sup> Over the past 70 years, the proliferation and strengthening of subcommittees and the decentralized nature of the committee system eliminated any streamlining attained by the 1946 Legislative Reorganization Act and increased the number of elements exercising oversight on executive agencies in both chambers. E. Scott Adler explains that, “members of Congress have fostered a structure in the legislative process that can both effectively govern and afford the flexibility needed to bolster relations with constituents for legislators who desire reelection.”<sup>202</sup>

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<sup>197</sup> Rieslbach, “Congressional Change,” 19.

<sup>198</sup> Adler, *Why Congressional Reforms Fail*, 1.

<sup>199</sup> Deering and Smith, *Committees in Congress*, 29.

<sup>200</sup> Mann and Ornstein, *The Broken Branch*, 146–147.

<sup>201</sup> Ibid., 150.

<sup>202</sup> Adler, *Why Congressional Reforms Fail*, 215.

Historically, substantive and lasting reforms to the committee system have never occurred and are unlikely to occur in the near future, largely due to the political purposes that motivate members of Congress.

#### D. RECOMMENDATIONS

Considering the programmatic oversight successes of Congress and history of failed attempts to streamline the committee system, the current system may be the best that can be expected. In her book, *Eyes on Spies*, Amy Zegart states, “perfect oversight is unachievable, but better oversight is.”<sup>203</sup> Accepting the conflicting motivations that prevent a simplified and streamlined system does not mean that improvements cannot be made. Opponents to reforms that threaten to streamline committee and subcommittee jurisdiction over DHS believe that informal processes for improving coordination between leaders and staffs would better serve the varied purposes for congressional oversight.<sup>204</sup> Undeniably, oversight coordination among committees and subcommittees has always been problematic, even in the defense realm. Numerous attempts have been made to improve coordination in the highly fragmented system through less formal means that do not disrupt existing committee jurisdictions. These less formal processes offer feasible alternatives to dramatic reform that aggressively attack committee jurisdiction.

Memorandums of understanding can improve coordination between committees and subcommittees with conflicting jurisdiction over DHS.<sup>205</sup> In the 110th Congress, members of the Senate Select Intelligence Committee, Appropriations Committee, and the Defense Appropriations Subcommittee created a memorandum of understanding that gave the leadership of each committee and subcommittee the right to attend each other’s meetings, hearings, and mark-up of bills.<sup>206</sup> The goal was to eliminate duplication and

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<sup>203</sup> Zegart, *Eyes on Spies*, 120.

<sup>204</sup> Ali, “Oversight Confusion Hinders Security Policy”; Associated Press, “Homeland Security Overwhelmed by Oversight.”

<sup>205</sup> Also known as memorandums of agreement.

<sup>206</sup> U.S. Library of Congress, Congressional Research Service, *Congressional Oversight of Intelligence*, 18.

conflicting legislation to foster unity of effort. Other memorandums of understanding have included provisions that split jurisdiction by time or specific issues within a policy realm. For example, the House and Senate Commerce Committees alternate investigative oversight responsibility annually,<sup>207</sup> which also reduces committee conflicts that prevent the passage of needed legislation. Memorandums of understanding are recorded as part of the congressional record and are typically respected during the referral of bills and provide a credible alternative to dramatic jurisdiction alterations.<sup>208</sup>

More involvement by party and chamber leadership can also mitigate the impact of fragmented jurisdiction without making changes to jurisdictional boundaries. For example, during the initial phase of the health care reform debate in 2009, chamber and party leadership were critical in getting the debate out of the committees and onto the floors of both chambers.<sup>209</sup> Similar to homeland security, jurisdiction of healthcare is fragmented. In the House, Representative Nancy Pelosi, Speaker of the House, pulled the Education and Labor, Energy and Commerce, and Ways and Means Committees together and managed their development of legislation.<sup>210</sup> In the Senate, Senator Christopher Dodd, acting Senate Minority Leader, pulled the Finance and Health, Education, Labor, and Pensions Committees together.<sup>211</sup> A difficult task indeed; both the Senate and House efforts were successful in generating legislation capable of being proposed to their entire chambers without threat of committee subversion. The influence of leadership external to the committee system committed to a common goal was able to mitigate the divisive interests of each committee in an area of jurisdictional overlap. More involvement from both party and chamber leadership would be instrumental in improving coordination among the conflicting committees overseeing DHS.

Reduced use of multiple referrals of bills that fall into the realm of homeland security would also reduce the impact of fragmented jurisdiction. Typically, bills are

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<sup>207</sup> Kaiser, Oleszek, Tatelman, “Congressional Oversight Manual,” 16.

<sup>208</sup> U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*, 2.

<sup>209</sup> Oleszek, *Congressional Procedures and the Policy Process*, 100.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

referred to only one committee.<sup>212</sup> However, the use of multiple referrals is increasing in both chambers. Determining which committee has predominant (Senate) or primary (House) jurisdiction is not easy to discern, and committees often struggle over jurisdictional rights, especially in homeland security.<sup>213</sup> Additionally, the complexity of contemporary issues regularly fall into multiple policy domains.<sup>214</sup> This situation has facilitated the increased use of multiple referrals to increase cooperation among committees and eliminate stovepipes. However, in the realm of homeland security, multiple referrals amplify the impact of the highly fragmented committee system. A return to single committee referrals would alleviate some of the conflicting guidance DHS often receives from multiple committees, and would facilitate the passing of better and needed legislation.

Committees that share homeland security jurisdiction should also hold joint hearings. By bringing together members from committees and subcommittees with overlapping jurisdiction, members still have the ability to conduct investigative oversight to inform their production of legislation, while dramatically reducing pressure on DHS. As stated in Chapter V, DHS officials participated in 536 hearings between 2007 and 2009, which is more than any other executive department or agency.<sup>215</sup> Not only would joint hearings dramatically reduce the amount of time and resources DHS spends responding, it would also foster more coordination and cooperation among committees, and positively impact the production of needed legislation and reduce conflicting guidance from Congress.

These options for improving committee cooperation go beyond the purely programmatic proposals presented in Chapter IV and consider the institutional and political purposes that motivate members of Congress. They offer feasible solutions that can mitigate some of the effects of Congress' highly fragmented oversight system on

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<sup>212</sup> U.S. Library of Congress, Congressional Research Service, *House and Senate Committee Organization and Jurisdiction*, 2.

<sup>213</sup> Oleszek, *Congressional Procedures and the Policy Process*, 98–99.

<sup>214</sup> Ibid., 102.

<sup>215</sup> NPR Staff, “Who Oversees Homeland Security;” Zegart, “Pre-9/11 State of Mind.”

DHS. All these options have been used in other policy realms with success. To be sure, these techniques are not formally instituted, can be revoked or ignored at any time, and will not solve all the issues with congressional oversight of DHS. However, considering the unlikelihood of any substantial reforms that attack sources of political power for members of Congress, these processes can increase cooperation among committees and subcommittees, and thus, mitigate the negative impacts of the highly fragmented system that oversees DHS.

As the United States entered the Cold War era and the national security bureaucracy dramatically expanded, Senator Arthur Vandenberg famously coined the phrase, “politics stops at the water’s edge.”<sup>216</sup> By that, the Senator was stating that personal or partisan politics should not be considered in matters of national security. The phrase became an institutional principle that many members of Congress repeat today. In reality, politics have not stopped at the water’s edge. Throughout the history of the modern Congress, members have been reluctant to relinquish the power that comes with jurisdictional authority, especially in the attention and resource grabbing realms, such as homeland security. From a congressional perspective, the committee system is a viable and important mechanism through which legislators can respond to their constituents, as well as guide the operation of the national government and maintain the constitutionally intended balance of power. Dramatic reforms that strip members of their opportunities to conduct election-seeking activities are not likely without external pressures that change the electoral environment.

The current structure of congressional oversight is preventing DHS from continuing its evolution into the lead coordinating agency of the national enterprise to improve homeland security. Failure to reform the oversight process could, at best, prolong DHS’s evolution into a unified and effective organization, or at worst, directly contribute to the failure to coordinate the prevention, response, and/or recovery during the next national level catastrophe. The 9/11 Commission plainly stated, “the American

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<sup>216</sup> United States Senate, “Arthur Vandenberg: A Featured Biography,” (n.d.), [http://www.senate.gov/artandhistory/history/common/generic/Featured\\_Bio\\_Vandenberg.htm](http://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_Vandenberg.htm).

people may have to insist that these changes occur, or they may well not happen.”<sup>217</sup> The missing ingredient from the past three eras of reform and today is public demand for specific change.<sup>218</sup> Until public demand, the limited options presented in this thesis provide the only feasible options for improving congressional oversight of DHS.

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<sup>217</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 419.

<sup>218</sup> Roger H. Davidson, “Congressional Committees in the New Reform Era: From Combat to Contract,” in *Remaking Congress: Change and Stability in the 1990s*, ed. James A. Thurber and Roger H. Davidson (Washington, DC: Congressional Quarterly Inc., 1995), 52.

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